IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1468

M. MORRIN & SON COMPANY, INC.
Petitioner

v.

BURGESS CONSTRUCTION COMPANY, and
GENERAL INSURANCE COMPANY OF AMERICA
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner M. Morrin & Son Company, Inc. prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 10, 1975.

OPINION

The opinion of the Court of Appeals is reported at 526 F.2d 108. A copy of that opinion and two sets of findings of fact and conclusions of law and judgments entered by the trial court are included as appendices (a) through (e).

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 10, 1975. A timely petition for rehearing was denied on January 14, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1) Whether it is a gross departure from the accepted and usual course of judicial proceedings, amounting to a denial of due process of law, for a trial court, after entering findings of fact, conclusions of law and a judgment consistent with the court's evaluation of the evidence throughout the trial, to vacate that judgment and to adopt verbatim, as submitted by counsel, totally contradictory findings, conclusions and judgment, without first permitting opposing counsel a hearing to challenge the sufficiency of evidence to support the findings.

2) Whether the Court of Appeals improperly sanctions such a departure when it sustains such substituted findings on the sole basis that they were not "clearly erroneous" and does not consider either the total divergence of the findings drafted by counsel from those first entered and from the court's comments upon the evidence throughout the trial or the unusual procedure by which the findings were drawn and entered.

3) Whether *United States v. Howard P. Foley Company, Inc.*, 329 U.S. 64 (1946), requires as a matter of law, that a subcontractor be denied contract compensation for increased costs borne by him but admittedly caused by delays of the general contractor in delivering the work sites to him.

4) Whether *United States v. Howard P. Foley Company, Inc., supra*, requires that a subcontractor, who has agreed to complete his work by a fixed time after site delivery, be denied extensions of time under *force majeure* provisions where delays in site delivery resulted in performance of the contract during extremely severe winter weather conditions rather than during the summer months when the work was scheduled by the contract.

5) Whether a termination of a subcontract under a government contract pursuant to a standard termination clause requires that the terminated subcontractor be denied compensation under the settlement provisions of the contract for additional work performed at the request of the general contractor or as a result of the fault of the general contractor.

STATEMENT OF THE CASE

This is a government contract case. Burgess Construction Company ("Burgess") was the general contractor for construction of Soldier Creek Dam in the Uintah Mountain area of Utah. M. Morrin & Son Company, Inc. ("Morrin") was the concrete subcontractor. The subcontract required Morrin to complete the first phase of concrete work to divert a river within the period April 1 through August 1, 1971, subject to conditions that Burgess deliver three critical sites to Morrin fully excavated and ready for concrete fabrication by specified lead dates. The subcontract provided for extensions of the completion date in the event of contractor delays; it incorporated all terms and conditions of the prime contract including *force majeure* and changed condition provisions. It also contained a right of termination clause by which Burgess could take over the subcontract if Morrin failed to comply with the character of work and time for performance provisions of the contract.

Delays in site preparation extended the concrete work from the summer into the winter months of 1971-1972. By reason of consequent scheduling uncertainties and increased costs due to adverse weather conditions, Morrin urged Burgess to defer the contract work until spring. However, Burgess was adamant that operations continue through the winter, in order that Burgess could accelerate completion of the prime contract by one year and save approximately $500,000.00 in costs.

In December 1971, Burgess requested that Morrin prepare a work schedule that would assure completion of all concrete work necessary for the river diversion by February 15, 1972. When Morrin responded that it could not schedule

completion by a date certain because of weather conditions, Burgess exercised its right of termination.

Burgess instituted an action in the United States District Court for the District of Utah (under 28 U.S.C. § 1332) to enforce its right to take over Morrin's work and to recover damages for Morrin's failure to complete its performance on time. Morrin commenced a separate action under the Miller Act (40 U.S.C. § 270(b)) for damages resulting from Burgess' delay in delivering work sites and from Burgess' wrongful termination of the contract. The actions were consolidated and tried to the court over a period extending from October 16, 1973 to November 12, 1973.

During the trial, counsel for Burgess acknowledged the existence of scheduling changes and admitted Morrin's entitlement to compensation for additional costs resulting from such changes. Only the amount of such extras was disputed. The trial court, on numerous occasions, commented upon the evidence in a manner favorable to Morrin and ultimately announced a result wholly consistent with its evaluation of the evidence throughout the trial.

The court found (1) that Burgess was responsible for delays in delivering work sites to Morrin, (2) that Morrin had not breached its contract, (3) that Burgess had no right to take over the concrete work and (4) that Morrin was entitled to judgment for increased costs plus interest and profit. On the basis of such findings, it entered Judgment for Morrin in the amount of $815,000.00.

Thereafter, on post trial motions of Burgess, the court concluded on June 28, 1974:

> "I have reread United States against Foley. That case, United States v. Howard P. Foley Company, 329 U.S. 64 (1946), controls the interpretation to be given to the critical contract terms in this case. Thus Morrin was entitled to an extension of sixty days, after December 28, 1971, in which to complete the entire first phase of the concrete work.
>
> "However, it is clear from the record and from the admissions of Morrin that Morrin could not complete the entire first phase of the concrete work within 60 days after December 28, 1971; therefore Burgess was entitled, under the contract to terminate Morrin's performance due to Morrin's anticipatory breach of the contract provisions.
>
> "Burgess should prepare and submit proposed findings of fact, conclusions of law, and a proposed order and judgment within 20 days."

Counsel for Burgess thereupon prepared and presented substitute findings of fact and conclusions of law which were adopted verbatim by the court and signed without further hearing.

The substituted findings altered every material finding of fact first entered; they were cast in a form making *Foley* applicable to this case; they wholly omitted findings theretofore made on admission of Burgess regarding additional contract costs incurred by Morrin; and they made an assumption, unsupported by the record, that a critical portion of the site was fully readied for *all* necessary concrete work on December 27, 1971. On the basis of such findings, Judgment was entered for Burgess in the amount of $330,000.00.

The Court of Appeals affirmed the judgment of the trial court on the basis that the findings were not "clearly erroneous." It apparently disregarded Morrin's vehement objections to the substituted findings of fact.

REASONS FOR GRANTING THE WRIT

This case requires review under the supervisory power of this Court to relieve petitioner from an arbitrary decision of the Honorable Willis Ritter, United States District Court for

the District of Utah, which has so far departed from the accepted and usual course of judicial proceedings as to constitute a denial to petitioner of due process of law. That decision has been inexplicably sanctioned by the United States Court of Appeals for the Tenth Circuit through an inappropriate application of the "clearly erroneous" test to the substituted findings of fact and conclusions of law, despite the fact that such findings and conclusions: (1) were prepared *ex parte* by prevailing counsel; (2) were entered by the court without hearing or modification; (3) were prepared to provide essential elements for a decision summarily announced from the bench; and (4) were wholly inconsistent with the court's comments upon the evidence throughout the trial and with the findings of fact and conclusions of law entered at the conclusion of the trial.

It also presents squarely to this Court the question whether the interpretation given to *United States v. Howard P. Foley Company, Inc.*, 329 U.S. 64 (1946) distorts that decision and conflicts with consistent contrary interpretations by the Court of Claims.

I. THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE BY THE DISTRICT COURT SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioner is aware of the obstacles it faces in persuading this Court to exercise its supervisory jurisdiction and require the reexamination of factual determinations that have already been sanctioned by the Court of Appeals. However, if there ever be a case that merits such attention, we submit that this is such a case. The manner in which "findings" prepared by counsel were accepted without comment or change by the District Court so departs from notions of fairness and accepted modes of procedure as to constitute a denial to petitioner of due process of law. The manner in which they were sustained by the Court of Appeals made the "clearly erroneous" test a matter of form and expediency devoid of substance. Finally, the factual determinations made by the District Court and affirmed by the Court of Appeals were, in fact, clearly erroneous and, as such, may and should be reviewed by this Court. *Neil v. Biggers*, 409 U.S. 1833 (1972).

This Court has frowned upon adoption by District Courts of verbatim findings of fact and conclusions of law prepared by a party to the controversy. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). This practice has also been strongly disapproved by Courts of Appeal as "an abandonment of the duty imposed upon trial judges by Rule 52, F.R. Civ. P., because findings so made fail to 'reveal the discerning line for decision. . . .' " *Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974); *accord, Roberts v. Ross*, 344 F.2d 747 (3d Cir. 1965).

Although the verbatim adoption of findings prepared by counsel may not be reversible error, *per se*, the practice calls for a determination by the appellate court that the trial judge had in fact "considered the case from all angles and reached his decision independently *before* placing reliance on the proposed findings" and the discernment of a measure of "personal analysis and determination." *Louis Dreyfus & Cie. v. Panama Canal Company*, 298 F.2d 733, 738 (5th Cir. 1962) (Emphasis by the court). No such determination was made in the present case.

The trial court's consistent "personal analysis" of the evidence throughout the trial, far from being obscure, manifestly supported determinations of fact and law exactly opposite to those that it adopted as submitted by Burgess' counsel. The record in this case will show:

1. Following lengthy trial the court entered findings of fact and conclusions of law favorable to Morrin's position

and entered judgment for Morrin in the amount of $815,000. Thereafter, following argument on post-judgment motions *some seven months later*, without hearing any additional evidence, the court vacated its findings and judgment and directed Burgess to prepare findings of fact, conclusions of law and judgment in its favor.

2. The findings of fact prepared by counsel for Burgess bore no relationship to the findings initially entered or to the comments and opinions expressed by the trial court during trial and on the first hearing on post-judgment motions. They asserted damages to Burgess in the amount of $330,000.

3. The court accepted the findings prepared by counsel and entered judgment thereon without the slightest consideration of the inconsistencies created between the first and second set of findings, the lack of evidence to support some of the new findings so made, or the lack of any opportunity for the surprised subcontractor to test such findings prior to their entry.

4. The court purportedly reversed its decision solely on the premise that *United States v. Howard P. Foley Company, Inc., supra,* precluded Morrin from recovering damages because of Burgess' delay in delivering work sites as scheduled. It concluded generally from that determination that Morrin no longer had any excuse for delaying completion of the concrete work because of changes and changed conditions for which Burgess was responsible. The court implicitly held that it was immaterial whether the work had to be performed under adverse winter weather conditions, and found that Morrin had somehow become responsible for the contract delays. No rational explanation can be found in the *Foley* case or in the post-judgment arguments for altering such findings and conclusions.

Foley could not be applicable to the present case under the original findings of the court. If *Foley* were applicable, it

would be limited by its terms to the question whether Morrin was entitled to damages as a result of the admitted scheduling delays of Burgess and, as such, it should not have affected the ultimate decision in any substantive way.

5. The decision of the trial court to vacate a judgment of $815,000 for petitioner and to enter judgment against petitioner for $330,000 had to rest upon the following critical findings of fact and conclusions of law:

(a) That *all* site preparation work required for the performance of petitioner's obligations had been completed by the contractor or other subcontractors on December 27, 1971. The Court will find the record lacking in evidence to support this critical finding. Only one part of the critical area was ready on this date, not the entire area, as required by the subcontract.

(b) That petitioner was not entitled to extensions under *force majeure* provisions incorporated into the contract by reason of exceptional obstacles of winter work. The trial court vacated a finding that *force majeure* conditions existed and failed to include a contrary substitute finding that they did not so exist. The evidence was uncontroverted that such conditions existed.

(c) That the contractor was not responsible for increased costs to petitioner for changes and changed conditions under the contract as a consequence of delays in preparation of sites for petitioner to perform its contract obligations. The trial court vacated a finding that changes and changed conditions did cause petitioner to incur costs of $734,664 (including overhead and profit) in excess of compensation paid under the contract. No substitute finding was made that such costs were not in fact incurred.

(d) That petitioner was not entitled to setoff against cost of completion damages, on takeover of the contract by Burgess, costs found initially by the court to be due Morrin

for changes and changed conditions. The substitute findings wholly ignored the contract termination clause under which Morrin was entitled to an offset for all amounts it was entitled to receive under the subcontract. The court did not find against such entitlements and, in fact, could not do so because such offsets were admitted by Burgess during the course of the trial.

The key findings were, in fact, no more than Burgess' claims for relief.

The inevitable result of this chain of procedural irregularity was a denial to petitioner of a full opportunity to have the facts underlying an award of damages against it tested in a court of law. Implicit in such a testing is a reasoned weighing of evidence, an application of known rules to such evidence and the rendering of a decision which, right or wrong, is a product of this process. The trial court here has not merely adopted findings which were not the product of independent judicial consideration; it rejected the apparent product of its own reasoning process (based upon numerous comments at trial). In so doing, the court departed completely from the concept of a trial as we know it. *Cf, Thompson c. City of Louisville,* 362 U.S. 199 (1960). The failure of the court to allow petitioner to be heard on these "findings" prior to their entry, in itself, amounts to a denial of due process. *Chicopee Manufacturing Corp. v. Kendall Co.,* 288 F.2d 719, 725 (4th Cir. 1961).

The smooth functioning of the judicial system is sorely strained by procedures that (1) permit a trial court to displace a judgment of $815,000 for one party (based upon findings of the court that were consistent with its bench evaluation of the evidence during trial) with a judgment against that party in the amount of $330,000 (resting wholly upon new and inconsistent findings supplied verbatim by private counsel) and that (2) lead an appellate court to affirm such *ex parte* findings on the basis that the evidence was

complex and conflicting and the findings were not "clearly erroneous." Several circuits have grappled with the propriety of the "clearly erroneous" standard for review in circumstances where the trial court's findings are clearly not the product of judicial determination and have denied that such findings are entitled to the "weight and dignity" they would merit "had they represented the unfettered and independent judgment of the trial judge." *The Severance,* 152 F.2d 916, 918 (4th Cir. 1945); *accord, In re Las Colinas, Inc.,* 426 F.2d 1005, 1010 (1st Cir. 1970). To date, however, no standard exists by which the Circuits may be guided in their efforts to scrutinize questionable findings and judgments. This Court must, in the exercise of its supervisory power, establish such guidelines which will guarantee to litigants the right to a judgment by a court of law.

II. THE COURT OF APPEALS HAS SANCTIONED A CONSTRUCTION OF *UNITED STATES v. HOWARD P. FOLEY COMPANY, INC., SUPRA,* WHICH DEPARTS FROM THE CLEAR MEANING OF THAT DECISION AND WHICH IS IN FUNDAMENTAL CONFLICT WITH CONTRARY INTERPRETATIONS BY THE COURT OF CLAIMS.

Apart from the procedural irregularities that have prompted this petition, the case should be reviewed for its potentially far-reaching substantive impact on government contract law. The Court of Appeals, in affirming the decision of the trial court, has held that conditions in government contracts for delivery of sites by specific dates are precatory at most and impose no enforceable obligations upon the government or general contractor. This determination will have a drastic impact on government contract and subcontract relationships throughout the country; contractors and subcontractors under standard contracts will be placed at the mercy of the scheduling whims of the other contracting party.

The Court of Appeals also sanctioned denial to the petitioner of the protection of *force majeure* contract clauses which provide for time extensions where the delays of the government or general contractor cause the subcontractor to meet performance deadlines under extremely severe weather conditions.

Finally, the Court of Appeals affirmed the use of a measure of damages which would deny to a terminated subcontractor recovery for additional work performed at the request of the general contractor or because of the fault of the general contractor.

The jurisdiction of this Court to review such determinations on *certiorari* is fully justified on the following bases:

1. *United States v. Howard P. Foley Company, Inc., supra,* has been construed and applied in this case contrary to its express limitations. Although the lower court applied the case to a subcontract, not involving the Constitution or statutes of the United States, a federal question is presented by the fact that (a) the trial court purported to determine the rights of the parties under *United States v. Howard P. Foley Company, Inc., supra,* a federal public contract case, and (b) petitioner assesrted a Miller Act claim against a general contractor. This Court has held in *F. D. Rich Co., Inc. v. United States,* 417 U.S. 116 (1974) that, for consistency in policy and decision, Miller Act claims by contractors and subcontractors present federal questions on substantive as well as remedial issues.

2. The decision of the Court of Appeals squarely conflicts with decisions of the Court of Claims. *Abbett Electric Corporation v. United States,* 142 Ct.Cl. 609, 162 F.Supp. 772 (1958); *George A. Fuller Co. v. United States,* 108 Ct.Cl. 70, 69 F.Supp. 409 (1947); *H. R. Henderson & Co., Inc. v. United States,* 169 Ct.Cl. 228 (1965).

CONCLUSION

For the reasons set out herein, we pray that *certiorari* be granted.

Respectfully submitted,

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APPENDIX (a)

BURGESS CONSTRUCTION COMPANY, an Alaska Corporation,
Plaintiff-Appellee,

v.

M. MORRIN & SON COMPANY, INC., a Utah Corporation, and General Insurance Company of America, an insurance company,

Defendants-Appellants.

U. S. for the Use and Benefit of M. MORRIN & SON COMPANY, INC., a Utah Corporation,
Plaintiff-Appellant,

v.

BURGESS CONSTRUCTION COMPANY, an Alaska Corporation, and General Insurance Company of America, a corporation,
Defendants-Appellees.

No. 74-1701.

United States Court of Appeals,

Tenth Circuit.

Argued May 23, 1975.

Decided Nov. 10, 1975.

Rehearing Denied Jan. 14, 1976.

Robert J. McNichols and Patrick A. Sullivan, Spokane, Wash., for appellants M. Morrin & Son Co., Inc., and Gen. Ins. Co. of America.

David K. Watkiss, Salt Lake City, Utah, for appellees Burgess Const. Co. and Gen. Ins. Co. of America.

Before HILL, SETH and HOLLOWAY, Circuit Judges.

HILL, Circuit Judge.

This litigation arose from the Bureau of Reclamation Soldier Creek Dam project. The appellee, Burgess Construction Company (hereinafter referred to as Burgess), was the prime contractor, and the appellant, M. Morrin & Son Company, Inc. (hereinafter referred to as Morrin), was the concrete subcontractor. Delays in the completion of the subcontract work led to a termination and take-over of Morrin's work by Burgess. Burgess then instituted an action to enforce its right to take over Morrin's work and to recover damages for Morrin's failure to complete its performance on time. Morrin commenced a separate action under the Miller Act[1] alleging Burgess breached the subcontract by delaying Morrin's access to work sites and by wrongfully terminating the subcontract. The actions were consolidated and tried to the court without a jury. General Insurance Company of America, the surety of both parties, was a codefendant in each case but did not actively participate in the litigation.

At the trial, the court entered judgment for Morrin, and findings of fact and conclusions of law consistent therewith, at the close of the evidence. Argument of the case was deferred until post-trial motions by Burgess were heard. After the parties had submitted briefs and argued the motions, the court set aside the prior judgment and entered new findings of fact and conclusions of law. Judgment was entered for Burgess in the amount of $330,345.88 plus interest. Morrin has appealed.

The facts are complicated and continue to be disputed on appeal. In October, 1970, Burgess was awarded the contract for the construction of a large earthen dam on Soldier Creek, approximately 80 miles east of Salt Lake City, Utah. Thereafter, Morrin and Burgess entered into negotiations culminating in the execution of a subcontract under which Morrin was to do certain concrete work on the project.

---

[1] 40 U.S.C. § 270b authorizes such suits in federal court on a government contractor's bond.

While Burgess conducted the earth-moving operations for building the dam, the river had to be diverted through tunnels. The relevant portions of the Morrin-Burgess subcontract called for Morrin to do the concrete work necessary to allow diversion through what was known as the lower tunnel. The factual dispute involves primarily the work on the lower inlet tunnel, the lower outlet tunnel, the gate chamber, and the stilling basin. The lower inlet tunnel is a circular concrete tunnel six feet in diameter and 750 feet long. The lower outlet tunnel is in the shape of an inverted U. It is eight feet high and 800 feet long. Between the inlet and outlet tunnels is the gate chamber — a large, cavernous area 36 feet high and 30 feet long. It contains steel tunnel liners and hydraulic gates which can be raised or lowered to control the flow of the river. The stilling basin is an above-ground structure resembling a large concrete building. Its purpose is to absorb the force and turbulence as the water flows out of the tunnels. Burgess also subcontracted other aspects of the diversion work, including the excavation and the fabrication, delivery and installation of the steel liners and gates.

The issues presented in this appeal relate to the obligations of the parties under the time of performance provisions of the subcontract. Burgess' successful bid was based on its plan to finish construction in two years, even though its contract with the Bureau of Reclamation allowed over three years. Completion within this time frame required diversion of the river before the spring of 1972. This fact was discussed by the parties during contract negotiations and is reflected in the time for completion stated in the subcontract. Morrin was obligated to complete the work here in question by August 1, 1971, with extensions of time equal to any delay in gaining access to the work sites on specified dates.

After the execution of the subcontract, Morrin submitted a schedule to Burgess showing its planned sequence of operation. Morrin planned to work first in the lower inlet tunnel,

beginning at the gate chamber and moving outward to the tunnel entrance. The second sequence of operations was the contemporaneous installation of the lower outlet tunnel and the gate chamber. The stilling basin was scheduled for continuous work by a separate crew beginning at the same time as the lower outlet tunnel and gate chamber. Morrin planned to utilize a small railway system to transport both the concrete and the pump, so that no concrete would have to be pumped in from the entrance to the tunnels. Morrin contemplated laying track once into the lower inlet tunnel and once into the lower outlet tunnel, thereby allowing placement of the gate chamber while the railroad was installed in the lower outlet tunnel.

Because of delays in gaining access to work areas, Morrin was required to work first in the stilling basin, second in the lower outlet tunnel, third on the lower inlet tunnel, and fourth in the gate chamber. Instead of installing the railroad twice, Morrin had to install it five times. The extent of delay in each work area is set out below.

LOWER OUTLET TUNNEL

The excavation was to be completed by April 1, 1971. Morrin was able to commence some work in the area on May 18, but the excavation was not fully completed until June 21, 1971. Morrin completed this work on October 28, requiring over 100 working days instead of the 48 its schedule predicted.

LOWER INLET TUNNEL

This area was likewise to be fully excavated to give Morrin access by April 1, 1971. There is evidence in the record that it was accessible in July and that Burgess requested work be commenced at that time. Morrin did not begin pouring concrete until November.

GATE CHAMBER

The gates and steel tunnel liners were to be delivered by May 15, 1971, and installed by June 1. They were a prerequisite to Morrin's work in the gate chamber because they required embedments in the concrete. The fabricator experienced difficulty in obtaining the type of steel necessary for the liners and did not complete delivery until September 18, 1971. Installation of the gates and liners was not finished until December 26, more than six months beyond the date anticipated in the contract.

THE STILLING BASIN

Morin scheduled its work here to begin on May 10, 1971, and end on July 17. Work was actually commenced on April 26 and completed in December. A portion of the area was left unexcavated until September 1.

As a result of the delays, Morrin was forced to continue working into the winter months when temperatures dropped as low as −40 degrees. Morrin failed to progress as Burgess felt it should, and on January 17, 1972, Burgess gave notice of its intention to terminate Morrin and prosecute the work itself with Morrin's equipment. Such action was authorized by the subcontract for failure to perform on time. On January 21, 1972, Burgess began the remainder of Morrin's work and completed it in May.

Summarizing the evidence and contentions of each party, Morrin contends Burgess was bound by the contract to make work sites available to Morrin on specified dates and is liable for damages resulting from its failure to do so. Morrin argues its inability to complete performance on time was due solely to delays caused by other subcontractors and attributable to Burgess. Morrin's witnesses indicated it spent over 700 work hours removing rock protrusions and muck left in the tunnels by the excavator in violation of the subcontract terms. Morrin's evidence further indicated that changes in

the sequence of its work made timely performance impossible and substantially increased its costs. It also contends winter work was not contemplated when the contract was made, and that winter weather conditions further added to the time and cost of its performance.

Burgess contends it was not bound to make work sites available on any certain date or in a certain order. It contends the dates mentioned in the subcontract were stated as conditions to Morrin's duty to perform by the date set in the subcontract. Burgess' evidence indicates Morrin's inability to perform on time was caused by its inefficiency. Remedial work for correcting errors, inadequate crews, and inadequate work shifts were among the reasons given by Burgess' witnesses for Morrin's delay. There was evidence that the tunnels had been checked for rock protrusions and approved, and any extra work in this regard would have been insignificant. An expert in this type of construction testified that Morrin should have been able to complete work on time notwithstanding the schedule changes. He did not consider it necessary to work in the sequence Morrin planned. Burgess' evidence also indicated winter work was contemplated when the contract was entered, and winter work did not materially change the nature of Morrin's performance.

The fundamental issue in this appeal is whether Burgess was contractually bound to give Morrin access to work sites on the dates stated in the contract. If it was, Burgess breached the contract and the judgment must be reversed. Morrin argues first that Burgess breached an express covenant to provide access on time. The relevant contract clauses state:

> SECTION 4. TIME OF PERFORMANCE: The Subcontractor agrees to keep himself informed as to the progress of the project and to faithfully prosecute his work, and the several parts thereof, at such times in such order as the Contractor considers necessary to keep the same sufficiently in advance of the other parts of the

project and to avoid any delay in the completion of the construction as a whole. The scheduled TIME OF PERFORMANCE of the work forming a part of this Subcontract is *See Exhibit B*.

The text of Exhibit B reads:

Time for completion of this work shall be as follows:

1. Concrete in lower tunnel, stilling basins and lower trash rack shall be complete to allow diversion of river through tunnel on or before 1 August 1971 *subject to:*

a. Lower tunnel excavation *must be* complete to allow access from both ends by 1 April 1971.

b. Excavation for lower tunnel chute and the stilling basins for both chutes *must be* completed by 1 April 1971.

c. Gates and steel liners for lower gate chamber *must be* delivered on or before 15 May 1971 and installed not later than 1 June 1971.

The subcontractor will be entitled to a time extension equal to any delay created by a, b or c above. (emphasis added)

[1-3] Morrin argues the use of the words "must be" creates an unconditional obligation by Burgess to complete the work necessary for site access on the stated dates. However, we cannot look only to the words Morrin chooses to emphasize; we must interpret the contract as a whole. 3 Corbin on Contracts § 549 (1960). Clause 1 of Exhibit B is a promise by Morrin to complete its work by August 1, 1971, "subject to" the work necessary for site access being completed at times stated in a, b and c. The words "subject to" usually indicate a condition to one party's duty of performance and not a promise by the other. 17 Am. Jur.2d *Contracts* § 320 (1964). The structure of Exhibit B, clause 1, in its entirety also indicates that subparts a, b and c are not independent

covenants, but are conditions. The inferior position of the alleged promises by Burgess indicates the parties did not consider them independent obligations of the same import as the obligation clearly assumed by Morrin in the primary clause. This interpretation is in harmony with Section 4 of the form contract of which Exhibit B is made a part. In Section 4 Burgess expressly reserves the right to direct the time and order of Morrin's performance. We do not find an expression of intent in Exhibit B to bind Burgess otherwise. The record shows that delay is not unusual in construction projects of this magnitude. The provision for extending Morrin's time in the event of delay by Burgess indicates this possibility was contemplated by the parties when the contract was made. In view of the wording and structure of the contract clause and the surrounding circumstances, we do not believe the parties intended to bind Burgess absolutely to provide site access on the specified dates. Rather, we agree with the trial court that this clause states conditions to Morrin's duty to complete its performance at the time stated in the subcontract.

[4-7] A contracting party may still be liable for damages caused by delay when there is no unqualified warranty or express covenant to provide site access at a definite time. Morrin argues that under the rule of *George A. Fuller Co. v. United States*, 69 F.Supp. 409, 108 Ct.Cl. 70 (1947), Burgess has breached an implied promise it would do nothing to hinder or prevent Morrin's performance. Burgess relies primarily on *United States v. Howard P. Foley Co.*, 329 U.S. 64, 67 S.Ct. 154, 91 L.Ed. 44 (1946),[2] where the Supreme Court held an extension of time cause similar to the one in the present case provided the injured contractor's sole

[2]The parties have briefed this case relying primarily on federal cases involving suits on a prime contract by a contractor against the government. In such cases, federal law controls. The law to be applied in suits on subcontracts is not so clear. When the construction of the Miller Act is not in issue and the United States is not a party to the subcontract, some circuits have held state law controls. Other circuits have held federal law controls in all actions under the Miller Act.

remedy. Morrin treats these cases as stating two separate rules and even argues *Foley* is no longer good authority.[3] However, subsequent cases have harmonized *Fuller* and *Foley*. Both cases are based on the rule that unreasonable delay is a breach of an implied obligation not to hinder or delay the other party's performance, in the absence of a contract clause contemplating and excusing the delay.[4] The court in *L. L.*

These cases are collected in *United States v. Western Cas. & Sur. Co.*, 498 F.2d 335, 338 n.4 (9th Cir. 1974). In a Miller Act action on a subcontract, the Supreme Court recently held that uniform rules of national application should control the awarding of attorney's fees. Whether the holding is limited to attorney's fees or extends the application of federal law to all Miller Act cases is not immediately clear. *F. D. Rich Co., Inc. v. United States*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974).

We do not distinguish between state and federal law in this opinion because we find no conflict between our decision and the law of Utah as expressed in *Russell v. Bothwell & Swaner Co.*, 57 Utah 362, 194 P. 1109 (1920). *United States v. Western Cas. & Sur. Co., supra.*

[3]Morrin points out that because the result in *Foley* and its progenitors, *United States v. Rice*, 317 U.S. 61, 63 S.Ct. 120, 87 L.Ed. 53 (1942), and *H. E. Crook Co. v. United States*, 270 U.S. 4, 46 S.Ct. 184, 70 L.Ed. 438 (1926), was considered unjust, changes were made in the required clauses in government contracts. When the most recent changes were made in 41 C.F.R. § 1-7.601 *et seq.*, avoiding the adverse effects of the "Rice" doctrine was one of the expressed reasons. 32 Fed.Reg. 16269 (1967). These required clauses provide for equitable adjustments to the contract in administrative proceedings. They do not change the law of contracts in suits seeking judicial relief for breach of contract. *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966). As recently as *Broome Constr., Inc. v. United States*, 492 F.2d 829, 203 Ct.Cl. 521 (1974), the Court of Claims followed the *Foley* holding as a vital principle of law.

In any event, this case does not involve the standard form clauses. The dispute is over a clause drawn and added to the contract by the parties.

[4]Although not always expressed in exactly the same terms, we believe this rule has been consistently followed. *Broome Constr., Inc. v. United States*, 492 F.2d 829, 203 Ct.Cl. 521 (1974); *L. L. Hall Constr. Co. v. United States*, 379 F.2d 559, 177 Ct.Cl. 870 (1966); *Kent v. United States*, 343 F.2d 349 (2d Cir. 1965); *Commerce Int'l Co. v. United States*, 338 F.2d 81, 167 Ct.Cl. 529 (1964); *Laburnum Constr. Corp. v. United States*, 325 F.2d 451, 163 Ct.Cl. 339 (1963); *see* Restatement of Contracts § 315.

Hall Construction Co. v. United States, 379 F.2d 559, 563, 177 Ct.Cl. 870 (1966), stated that in cases under this rule:

> the questions on which liability turns . . . are whether defendant was the cause of the delays here, whether it failed to use reasonable diligence and good faith in performance of its responsibilities under the contract, and whether the contract contemplated and excused the delays.

[8, 9] First, we consider whether the delays which occurred were contemplated and excused by the subcontract. It provides: "The subcontractor will be entitled to a time extension equal to any delay created by a, b or c above." An extension of time clause alone does not necessarily provide an exemption from damages for delay, but:

> It may, in conjunction with other facts, indicate, as it was held in the Foley case, that the . . . [defendant] did not obligate itself to provide materials or a site or to complete certain work by a certain time. In such cases it is a reasonable construction of the contract that delays in doing these things were anticipated and fully provided for by the provision for an extension of time.

Kehm Corp. v. United States, 93 F.Supp. 620, 119 Ct.Cl. 454 (1950).[5] Whether there were "other facts" indicating Burgess was not obligated to provide the work sites at any certain time and not subject to the imposition of damages for delay is largely a question of fact for the trial court. Although the evidence is not overwhelming on this point, Burgess introduced evidence that it was not the intent of the parties to bind Burgess to pay damages should delay of the type en-

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[5]Some cases state there must be a clause "expressly" exempting defendant from liability. *See, e. g., L. L. Hall Constr. Co. v. United States*, 379 F.2d 559, 177 Ct.Cl. 870 (1966). Under this statement, an extension of time clause could be considered insufficient under any circumstances to "expressly" negate liability for damages. However, a reading of several cases (*see* cases cited note 4, *supra*) indicates *Kehm* correctly states the rule. Moreover, *Hall* cites *Kehm* with approval.

countered actually occur. It was not clearly erroneous[6] for the trial court to base its decision on this evidence rather than Morrin's evidence to the contrary. Therefore, we affirm the trial court's holding that the delay was contemplated by the subcontract, and that Burgess is not liable for damages caused by the delay.

[10, 11] Even if we decided the extension of time was not the sole remedy, Morrin still could not recover. Breach of an implied promise not to hinder or delay the other party's performance is not established merely by proving there was delay. The delay must be unnecessary, unreasonable or due to defendant's fault. *Broome Construction, Inc. v. United States*, 492 F.2d 829, 203 Ct.Cl. 521 (1974).[7] There is no contention that Burgess acted in bad faith. On the contrary, Morrin took the position that the reason or necessity for the delay was immaterial. When Burgess' counsel sought to examine a witness concerning the reason for delay in obtaining the steel for the gates and tunnel liners, Morrin objected. Its counsel stated, "I don't see any materiality of his difficulty in obtaining steel. . . . As far as we were concerned, there was a certain time it was supposed to be there, and where he got it and what difficulty he had is immaterial to this case. . . ." The objection was sustained.

Nevertheless, testimony was admitted indicating Burgess acted in good faith and its delay was not unreasonable or due to its fault. This testimony was admitted on issues primarily relating to whether Morrin's inability to complete its work on time was due to Burgess' delay or its own inefficiency. We do not attribute perfection to Burgess. However, neither do we find the type of delay by Burgess that constitutes a breach of an implied promise not to hinder or delay the subcontractor.

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[6]F.R.Civ.P. 52(a).

[7] *See Chalender v. United States*, 119 F.Supp. 186, 127 Ct.Cl. 557 (1954); cases cited note 4, *supra;* 4 Corbin on Contracts § 947 (1951).

[12, 13] We must now determine whether Burgess breached the subcontract by terminating Morrin and taking over the remainder of its work. Morrin does not question the validity of the termination clause which gave Burgess the right to terminate should Morrin fail to comply with the time of performance provisions of the subcontract.[8] Morrin's only argument in this regard is that the decision to terminate was based on inaccurate information concerning the cause of Morrin's inability to complete its work on time. However, there is substantial evidence in the record confirming that Morrin was not able to complete performance on time and that Burgess was justified in exercising its power of termination.[9] We find that Burgess complied with the terms of the subcontract's termination clause and was not guilty of a breach.

[14] The trial court enumerated 31 findings of fact. Morrin contends 19 of them were clearly erroneous. Were we to look only at Morrin's evidence, we might be able to agree with its contentions, but we must look at the whole record.[10] As the facts stated in this opinion disclose, the evidence was conflicting in varying degrees on every major point of contention. In such cases the "clearly erroneous" rule creates a difficult burden for an appellant. To discuss each

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[8]Termination clauses are valid. *Goltra v. Weeks*, 271 U.S. 536, 46 S.Ct. 613, 70 L.Ed. 1074 (1926); 3A Corbin on Contracts § 721 (1960).

[9]There was evidence that Burgess held several meetings with Morrin prior to the take-over and had expressed its concern with Morrin's poor performance. As early as October 7, 1971, Burgess informed Morrin that unless its performance improved, Burgess might take over the work. To this Dean Morrin responded, "Be my guest." Burgess made repeated requests for an updated completion schedule, but received no estimate until after the termination letter. An expert witness testified Morrin should have been able to complete performance within the time allowed in the contract with extensions for delay in site access. In addition, a Bureau of Reclamation inspector testified Morrin's work was substandard and inefficient. He attributed the causes of delay to Morrin.

[10]*Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974).

finding of fact individually would require too many pages of this opinion. Therefore, we will group them according to the issues.

We have already stated our opinion that the evidence was sufficient to support the trial court's finding that Burgess breached neither an express nor an implied promise to provide work sites on certain dates. We likewise have found the evidence sufficient on issues relating to the termination and take-over of Morrin's work. However, Morrin makes an additional argument on this point. The trial court found the last work on which Morrin's time of performance was conditioned was completed on December 27, 1971. Morrin argues this is clearly erroneous because one witness, Morrin's president, testified that work not mentioned in the subcontract, consisting of bypass piping and electrical conduit, was not complete until February 21, 1972, and that four concrete pours in the gate chamber could not be made until this was done. According to Morrin, the trial court should have found the subcontract allowed Morrin two months from February 21, rather than December 27, to complete its work. We do not believe the trial court's finding is erroneous. Other witnesses testified the gate chamber was available for pouring concrete in accordance with the terms of the subcontract on December 27, 1971. Moreover, the evidence indicates it was clear at the time of termination that Morrin would be unable to complete on time. Nowhere does Morrin argue that it could.

[15] Of the other findings Morrin contests, many concern whether Morrin's inability to perform on time was caused by its inefficiency or by extra work and schedule changes forced on it by Burgess. There was substantial evidence that the extra work was insignificant and the schedule changes should not have prevented Morrin from completing on time. In any event, error in these findings could not be a basis for reversal. The schedule of operations was for the convenience of Burgess and Morrin and other subcontractors in

coordinating the work. Burgess did not guarantee that Morrin would be allowed to work in the sequence its schedule proposed. On the contrary, Burgess retained the right to direct the order of Morrin's performance in the manner necessary to the completion of the project as a whole.

[16, 17] Finally, Morrin contends certain items of damages in the judgment are not supported by the evidence. Morrin contends it was erroneous to include an amount for overhead in Burgess' damages for the cost of completing Morrin's work. The amount was calculated by allocating a percentage of Burgess' total overhead to the work completed on the Morrin subcontract. Morrin argues there is no proof the extra work actually increased Burgess' overhead or, if it did, in what amount. Under the circumstances, however, this was the best measure available. Overhead is a proper element of cost of completion damages, and an allocation is a proper measure of the amount. *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. 1967); *Grand Trunk Western R. Co. v. H. W. Nelson Co., Inc.*, 116 F.2d 823 (6th Cir. 1941). We have examined the record and conclude there was no error in the other items of damage contested on appeal by Morrin.

Although Morrin may have suffered substantial losses on this transaction, under the terms of the subcontract Burgess committed no breach and Morrin is not entitled to damages. The evidence did establish a breach by Morrin. We find no error in the judgment of the district court.

Affirmed.

APPENDIX (b)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation,
Plaintiff,

vs.

M. MORRIN & SON COMPANY, INC.
a Utah corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
an insurance company,
Defendants.

C-26-72

USA/FOR THE USE AND BENEFIT OF
M. MORRIN & SON COMPANY, INC.,
a Utah corporation,
Plaintiff,

vs.

BURGESS CONSTRUCTION COMPANY,
an Alaska corporation; and GENERAL
INSURANCE COMPANY OF AMERICA,
a corporation,
Defendants.

C-158-72

FINDINGS OF FACT and CONCLUSIONS OF LAW

These consolidated actions came to trial October 16, 1973 and concluded November 10, 1973. BURGESS CONSTRUCTION COMPANY, an Alaska corporation ("BURGESS") and GENERAL INSURANCE COMPANY OF AMERICA, its surety, were represented by their attorneys,

Pugsley, Hayes, Watkiss, Campbell & Cowley, Mr. David K. Watkiss and Mr. Robert Campbell of counsel; M. MORRIN & SON COMPANY, INC., a Utah corporation ("MORRIN") and its surety, GENERAL INSURANCE COMPANY OF AMERICA, were represented by their counsel, Van Cott, Bagley, Cornwall & McCarthy, Mr. Clifford L. Ashton of counsel, Winston, Cashatt, Repsold, McNichols, Connelly & Driscoll, Mr. Patrick A. Sullivan, Mr. Robert J. McNichols, and Mr. Robert Taylor of counsel, and Young, Thatcher & Glasmann, Mr. Blaine V. Glasmann of counsel.

GENERAL INSURANCE COMPANY OF AMERICA, a Washington corporation ("GENERAL") was the surety on the prime contractor's bond and also surety on the subcontractor's bond running to the prime contractor. GENERAL was not represented by independent counsel.

The parties presented evidence and rested their respective cases on November 10, 1973.

The Court hereby makes the following

FINDINGS OF FACT

1. BURGESS is an Alaska corporation and was the general contractor upon a United States Government project commonly known as the Soldier Creek Dam located within the jurisdiction of the United States District Court for the District of Utah.

2. Pursuant to the provisions of 40 U.S.C. § 270, *et seq.*, GENERAL as surety and BURGESS as principal provided a performance and payment bond for the protection of those furnishing labor, materials or equipment to the subject project.

3. BURGESS as general contractor entered into a contract with the United States of America for the construction of the project and elected to perform the primary work in a

period of two years rather than the three-year period contemplated by the general contract.

4. In the fall of 1970, BURGESS negotiated a subcontract agreement with MORRIN under the terms of which MORRIN was to perform the labor and provide the materials and equipment for completing the concrete phases of the project. The work which MORRIN contracted to do pursuant to the subcontract consisted of the placement of concrete and reinforcing steel in certain underground tunnels and chambers together with certain above ground concrete work.

5. The negotiations culminated in the execution of the subcontract, which required MORRIN to complete certain concrete work for river diversion by August 1, 1971, subject to BURGESS meeting three critical preparatory conditions. In making this determination, BURGESS was motivated by its desire to place vast quantities of earth fill within two seasons rather than three so that it could prevent the expenditure of $550,000 in the use of heavy earth-moving equipment.

6. As a result of these negotiations, BURGESS contracted with MORRIN and agreed to make critical work areas needed by MORRIN available in the manner and at the times set forth in Exhibit B to the subcontract agreement (Exhibit D-2). BURGESS failed to comply with any of the critical, Exhibit B provisions and as a direct result of such failure by BURGESS, MORRIN was required to completely reschedule its work; to perform it in a sequence not planned upon or contemplated by the parties and over a period substantially in excess of the period contracted for and into the severe winter months of 1971 and 1972.

7. Immediately upon learning that BURGESS was not complying with its obligations under the subcontract, MORRIN gave notice, both written and oral, that MORRIN would not be able to do the concrete work within the time and in the

manner planned and would hold BURGESS responsible for all additional costs incurred.

8. After it became apparent to BURGESS that BURGESS could not meet its obligations to make the necessary areas available to MORRIN as contracted, BURGESS rescheduled the date for diverting the river from the initial date of late summer 1971 until mid-February of 1972. BURGESS then directed MORRIN to proceed to do the work in the manner and over the time period in which it was actually done.

9. BURGESS as the general contractor had the duty to coordinate the work of other contractors and failed to properly do so. This failure, along with other delays caused by BURGESS, contributed to MORRIN'S inability to perform its work in proper and timely sequence.

10. Because of the failure of BURGESS to comply with the subcontract, the work which MORRIN performed on the project was performed in a manner and under conditions substantially different than those contracted for.

11. As a result MORRIN was required to provide labor, materials and equipment over the period April, 1971 into January, 1972 in an effort to complete the concrete work necessary for diversion rather than being permitted to do it in the four-month period April to July of 1971.

12. MORRIN'S bid to BURGESS which equalled the amount of the subcontract was reasonable and had BURGESS complied with its contractual obligations to MORRIN under the subcontract agreement, MORRIN could have completed the concrete work necessary for diversion within the time frame set forth in the subcontract and would have realized a reasonable profit.

13. As a direct result of the breach of contract by BURGESS, specifically its failure to provide the areas of work at the times and in the condition required by the subcontract,

and its failure to properly coordinate the work, MORRIN incurred substantial additional costs for labor and equipment which would not have been incurred had MORRIN been able to perform in the manner and sequence contemplated by the subcontract.

14. The evidence introduced by MORRIN reasonably reflects the damages incurred by it, and said evidence shows that all labor, materials, and equipment furnished by MORRIN made it possible for BURGESS to avoid expenditures of $550,000 or more in later stages of BURGESS'S work.

15. In January of 1972, BURGESS terminated MORRIN'S subcontract contending that MORRIN was responsible for the delay in completing the necessary concrete work required to divert the river. In fact such delay was not the responsibility of MORRIN but was solely the responsibility of BURGESS.

16. Subsequent to such termination, MORRIN was directed to remove its personnel from the project and BURGESS appropriated quantities of MORRIN'S equipment and materials for its own use to complete the work. BURGESS failed to pay MORRIN for such equipment and materials or the amount BURGESS agreed was owing to MORRIN at that time.

17. MORRIN'S costs in performing the work under the subcontract were determined by Ernst & Ernst, Certified Public Accountants and such audit reflects MORRIN'S actual costs together with general and administrative expenses. The costs and expenses reflected in said audit are reasonable.

18. The actual costs incurred by MORRIN in performing the work which MORRIN performed including a reasonable allowance for general and administrative expenses of 5.86 percent and the reasonable value of MORRIN'S equipment which was utilized by BURGESS in completing the

subcontract work after termination is $1,175,743.64. A reasonable profit of ten percent equals $117,574.36. The reasonable costs incurred by MORRIN plus a ten percent profit totals $1,293,318.00.

19. As of the time of termination MORRIN had been paid on progress payments throughout the contract period $520,514.17, and under the theory of *quantum meruit*, BURGESS was entitled to credits and offsets for remedial work and concrete sales to others of $41,072.48. This credit is reflected in the Certified Audit in evidence as Exhibit D-82.

20. During the trial the parties stipulated to a credit to BURGESS in the sum of $10,000 to avoid the time which would be required to present evidence on certain possible duplications in the accounting records.

21. After deductions of just credits and offsets, the fair value of MORRIN'S work for which MORRIN has not been paid, including overhead and profit is $734,664.00 as reflected in Exhibit D-82.

22. MORRIN is entitled to interest at the legal rate of six percent per annum upon the foregoing figure from the date of termination of the subcontract, January 21, 1972, to date of judgment. Said interest amount is $79,581.00.

23. MORRIN did not breach the subcontract with BURGESS and BURGESS was not damaged in any manner through any actions or inactions of MORRIN.

24. A reasonable amount to allow THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC. as attorneys' fees in these proceedings is $203,557.00.

From the foregoing FINDINGS OF FACT the Court makes the following:

CONCLUSIONS OF LAW

1. The Complaint of BURGESS CONSTRUCTION COMPANY in Cause No. C-26-72 should be dismissed with prejudice.

2. THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC. is entitled to interest at the rate of six percent per annum upon the principal amount of this Judgment from the date of termination of the subcontract until date of Judgment.

3. THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC. is entitled to judgment in Cause No. C-158-72 against BURGESS CONSTRUCTION COMPANY and GENERAL INSURANCE COMPANY OF AMERICA jointly and severally in the sum of $814,235.00, together with the additional sum of $203,557.00, attorneys' fees.

DATED this 12th day of November, 1973.

WILLIS W. RITTER, Chief Justice
United States District Court

APPENDIX (c)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BURGESS CONSTRUCTION COMPANY, an Alaska corporation,
Plaintiff,

vs.

M. MORRIN & SON COMPANY, INC. a Utah corporation; and GENERAL INSURANCE COMPANY OF AMERICA, an insurance company,
Defendants.

C-26-72

USA/FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC., a Utah corporation,
Plaintiff,

vs.

BURGESS CONSTRUCTION COMPANY, an Alaska corporation; and GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Defendants.

C-158-72

JUDGMENT

The Court having heretofore entered its FINDINGS OF FACT AND CONCLUSIONS OF LAW in these consolidated cases,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Complaint of BURGESS CONSTRUCTION COMPANY in Cause No. C-26-72 is hereby dismissed with prejudice and with costs to M. MORRIN & SON COMPANY, INC.

2. THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC. is hereby granted judgment in Cause No. C-158-72 against BURGESS CONSTRUCTION COMPANY and GENERAL INSURANCE COMPANY OF AMERICA jointly and severally in the sum of $814,235.00, together with the additional sum of $203,557.00, for attorneys' fees.

DATED this 12th day of November, 1973.

WILLIS W. RITTER, Chief Justice
United States District Court

APPENDIX (d)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BURGESS CONSTRUCTION COMPANY, an Alaska corporation, *Plaintiff,* vs. M. MORRIN & SON COMPANY, INC. a Utah corporation; and GENERAL INSURANCE COMPANY OF AMERICA, an insurance company, *Defendants.*	C-26-72 ORDER OPENING, VACATING, AND SETTING ASIDE JUDGMENT, FINDINGS OF FACT, AND CONCLUSIONS OF LAW and ENTERING NEW FINDINGS OF FACT AND CONCLUSIONS OF LAW
USA/FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC., a Utah corporation, *Plaintiff,* vs. BURGESS CONSTRUCTION COMPANY, an Alaska corporation; and GENERAL INSURANCE COMPANY OF AMERICA, a corporation, *Defendants.*	C-158-72

The above cases, Civil Action C-26-72, including the complaint of Burgess Construction Company ("Burgess") and the counterclaim of M. Morrin & Son, Inc. ("Morrin"), and Civil Action C-158-72, including the complaint of the United States of America for the use and benefit of Morrin and the

answer of Burgess and General Insurance Company ("General"), having been consolidated for trial, came on regularly to be heard on October 16, 1973, before the Honorable Willis W. Ritter, Chief United States District Judge, sitting without a jury.

Burgess and General, Burgess' surety, were represented by their attorneys, David K. Watkiss, Esq., and Robert S. Campbell, Jr., Esq., of Pugsley, Hayes, Watkiss, Campbell & Cowley; and Morrin and General, Morrin's surety, were represented by their attorneys, Clifford L. Ashton, Esq., of Van Cott, Bagley, Cornwall & McCarthy; Patrick A. Sullivan, Esq., Robert J. McNichols, Esq., and Robert Taylor, Esq., of Winston, Cashatt, Repsold, McNichols, Connelly & Driscol; and Blaine V. Glasmann, Esq., of Young, Thatcher & Glasmann.

The parties rested their respective cases on November 10, 1973, after nine days of trial and an intervening continuance. Thereupon the Court directed counsel for Morrin to prepare and present Findings of Fact and Conclusions of Law and Judgment. On November 12, 1973, the Court adopted and entered Findings of Fact and Conclusions of Law and Judgment which in Civil Action C-158-72 found in favor of Morrin and against Burgess and General, jointly and severally, in the amount of $814,235 together with attorneys' fees in the sum of $203,557 for a total Judgment of $1,017,792, and in Civil Action C-26-72 dismissed the complaint of Burgess with prejudice.

Burgesss filed timely motions pursuant to the Federal Rules of Civil Procedure to alter and amend the Judgment under Rule 59 (e), for a new trial under Rule 59 (a), for relief from the Judgment under Rule 60 (b), and to amend and supplement the Findings of Fact and Conclusions under Rule 52. These motions were heard on May 9, 1974, each party having submitted briefs in support of their respective

positions. Further oral argument was presented on June 28, 1974.

The Court is now fully advised in the premises, and it appearing to the Court that the Findings of Fact, Conclusions of Law and Judgment of November 12, 1973, were inappropriate and erroneous and should be vacated and set aside and that the Court should open the Judgment and make new Findings of Fact and Conclusions of Law and then enter a new superseding Judgment;

NOW, THEREFORE, pursuant to Rule 59 (a) and Rule 59 (e) of the Federal Rules of Civil Procedure

IT IS ORDERED that the Judgment entered in the above entitled actions on November 12, 1973, be and the same is hereby opened, set aside and vacated, that the Findings of Fact and Conclusions of Law entered on November 12, 1973, be and the same are hereby annulled, vacated and set aside, and that new Findings of Fact and Conclusions of Law be and are hereby made as follows:

FINDINGS OF FACT

A. Jurisdiction of the Court

1. This Court has jurisdiction of Civil Action C-26-72 under 28 U.S.C. §1332 (70 Stat. 658) in that the amount in controversy, exclusive of interest and costs, exceeds the sum of $10,000 and is between citizens of different states; and of Civil Action C-158-72 under 28 U.S.C. §1331 in that it arises under 40 U.S.C. §270, *et seq.* (Miller Act).

B. The Parties

2. Burgess, an Alaska corporation, is a general contractor doing business in the State of Utah.

3. Morrin, a Utah corporation with its principal office in Odgen, is engaged in general construction.

4. General, a Washington corporation, was the corporate surety on the payment and performance bonds on this project for both Burgess and Morrin.

C. The Subcontract Agreement

5. In August 1970 the United States Bureau of Reclamation advertised for bids for the construction of a 265 foot earthen dam on Soldier Creek, approximately 80 miles east of Salt Lake City, Utah.

Burgess submitted a bid and on October 17, 1970, was awarded the contract for the project by the Bureau.

6. Morrin gave Burgess a verbal quote for the concrete and certain other project work prior to the submission of the Burgess bid to the Bureau and, following the award of the contract to Burgess, entered into further discussions with Burgess which culminated in execution of a Subcontract Agreement on November 4, 1970, after Morrin had been made aware of Burgess' work schedule.

7. The Subcontract Agreement required Morrin to perform all of the concrete work on the project. It was on a printed form with two type-written exhibits attached, designated Exhibit A and Exhibit B. Exhibit A set forth the unit prices of the Morrin work and additional contractual provisions not covered in the printed form. Exhibit B dealt specifically with the time for completion of Morrin's work.

8. The only portion of the subcontract work relevant to this litigation is the concrete work required to divert Soldier Creek through the lower tunnel. This encompassed the concrete work in the stilling basins and lower chute; the lower tunnel, including the inlet, the outlet, the gate chamber, the lower adit and lower portion of the shaft; and the lower intake structure, including the lower trash rack.

D. Time for Performance Under Subcontract

9. Under the Subcontract Agreement, Morrin was obligated to complete all concrete work to allow diversion of the river through the lower tunnel on or before August 1, 1971. This date was crucial because the dam embankment could not be constructed until the river had been diverted through the lower tunnel.

Morrin's obligation to complete the concrete work for diversion through the tunnel on or before August 1, 1971, was expressly subject to and conditioned upon the following conditions precedent:

a. that the lower tunnel excavation be completed so as to allow access from both ends by April 1, 1971;

b. that the excavation for the lower tunnel chute and the stilling basin be completed by April 1, 1971;

c. that the gates and steel tunnel liners for the lower gate chamber be delivered to the project site on or before May 15, 1971, and installed not later than June 1, 1971.

Accordingly, under the Subcontract Agreement, Morrin was allowed four months, from April 1 to August 1, 1971, to perform its concrete work in the lower tunnel and in the stilling basin and two months, from June 1 to August 1, 1971, to complete its work in the area of the gate chamber.

10. Burgess did not promise to have the lower tunnel, lower tunnel chute, and stilling basin excavation complete by April 1, 1971, or to have the gates and steel liners installed by June 1, 1971. The Subcontract Agreement provided that, in the event any of the foregoing conditions precedent did not occur on or before the specified dates, Morrin was entitled to a time extension equal to the period of the delay. This extension of time was Morrin's only relief for any such delay.

11. The time set forth in the Subcontract Agreement for completion by Morrin of the concrete work for diversion, after the occurrence of the conditions precedent, was of the essence.

E. Manner in Which Morrin Was to Perform

12. In the Subcontract Agreement Morrin agreed to prosecute its work in a proper, efficient and workmanlike manner; to perform the concrete work at such times and in such order as Burgess determined to be necessary to keep the concrete work sufficiently in advance of the other parts of the project; and to avoid any delay in the completion of the project as a whole. Morrin additionally agreed not to delay, interfere with, or hinder the work of the contractor or any other subcontractor.

13. The Subcontract Agreement required Morrin to furnish Burgess, upon request, schedules indicating the time and place of the performance of its required work.

14. After the execution of the Subcontract Agreement, Morrin submitted a schedule showing the sequence in which it planned to do the concrete work on the project. This schedule indicated that Morrin would work first in the lower tunnel inlet, commencing March 28, 1971, and finishing May 7, 1971, and then in the lower tunnel outlet, commencing May 10, 1971 and finishing July 17, 1971. The outside work in the stilling basin and lower chute was also scheduled to begin May 10, 1971 and to finish July 17, 1971.

F. Morrin's Performance

15. The periods of time actually required by Morrin to perform the work in each area were:

a. The stilling basin: Morrin was provided access to this area on April 26, 1971, and commenced work there on that date. Except for a ten day period in late August, Morrin worked continuously in this area, forming, pouring, and doing remedial work until approximately December 8, 1971, when work there was completed. To complete this work, Morrin required more than three times the time it had scheduled.

Pursuant to an agreement between the parties, an unexcavated area referred to as the "plug" was left in the stilling basin just outside the downstream end of the lower tunnel. This plug did not interfere with Morrin's work except when it was excavated during a ten day period just prior to September 1, 1971.

b. Lower tunnel outlet: Morrin had access to the lower tunnel through the downstream end and commenced work in the lower tunnel outlet on May 18, ten days after the date it had scheduled this work. Morrin did not, however, complete this work until October 27, 1971, requiring 105 work days instead of the 48 it had scheduled.

c. Lower tunnel inlet: The lower tunnel inlet and upstream portal were available to Morrin on June 21, 1971, when all underground excavation was completed. Morrin did not, however, immediately commence its work in this tunnel. In July, Burgess, concerned about the lack of progress of Morrin's work, requested Morrin to begin work in this area. However, Morrin did not commence to pour the required placements in this area until November 1, 1971.

d. Gate chamber: The unavailability of the stainless steel required for the fabrication of the gates and liners delayed their delivery to the work site until September 15, 1971. Because Morrin was then working in the lower outlet tunnel through which the gates and liners had to be taken, the gates and liners were not transported into the gate chamber until early November. Installation was completed on December 27, 1971. The delay in the installation of the gates and liners prevented Morrin from performing only the concrete work required in the gate chamber. All other work areas were available to Morrin and unaffected by the delay in installation of the gates and liners.

16. The Subcontract Agreement allowed Morrin four months to complete the stilling basin after access was given,

four months to complete the lower tunnel after access was given, and two months to complete the gate chamber after access was given.

a) Morrin was given access to the stilling basin on April 26, 1971. Therefore, it had until August 26, 1971, to complete the stilling basin. Yet this work was not completed until December 8, 1971, some three and one half months late.

b) Morrin was given access from both ends of the lower tunnel on June 21, 1971. Therefore, it had until October 21, 1971, to complete its required work in the lower tunnel. Yet this work was *not* completed by Morrin as of January 21, 1972, (Morrin's last day on the job), which was some three months late.

c) Morrin was given access to the gate chamber on December 27, 1971. Therefore, it had until February 27, 1972, to complete the gate chamber. Since the gate chamber was the final portion of the work necessary for diversion, Morrin had until February 27, 1972, to complete the entire first phase of the concrete work.

17. Morrin could not have completed the entire first phase of the concrete work — that is, the work required for diversion — by February 27, 1972. Morrin acknowledged to Burgess in January, 1972, that it could not complete its work within the time allowed by the Subcontract Agreement, and Morrin's past performance confirmed its admisssions. As of January 21, 1972, Morrin had completed only the stilling basin and the outlet portion of the lower tunnel. All of the remaining areas — namely, the lower inlet tunnel, gate chamber, lower intake structure, lower adit and lower portion of the shaft — were unfinished. In the latter three areas, work had not even begun. Morrin thus substantially and materially failed to perform the concrete work in the time and manner required by the Subcontract Agreement.

18. Morrin orally and in writing stated to Burgess prior to January 21, 1972, that it could not complete its work until April 30, 1972. This date — even assuming Morrin could have performed by then — was materially beyond the February 27, 1972 date required under the Subcontract Agreement. Morrin's explicit statements of inability to perform, together with its past failures of performance, constituted an anticipatory breach of the Subcontract Agreement by Morrin.

19. In addition, Morrin substantially and materially failed to perform the concrete work in a workmanlike manner, refused to proceed with the work in the time and manner directed by Burgess, and failed and refused to provide Burgess with requested work schedules, all as required under the Subcontract Agreement. These failures were unexcused.

20. Morrin's delayed performance and the cost overruns that resulted therefrom were the responsibility of Morrin under the terms of the Subcontract Agreement. While Morrin encountered certain areas in the lower outlet tunnel with protrusions of rock known as tights which it had to remove, the evidence established that such tights were minor in nature and unsubstantial and that Morrin did not experience significant delay or costs as a result thereof.

G. Remedies for Breach Under the Subcontracts

21. The Subcontract Agreement provided that in the event Morrin failed to comply or became disabled from complying with the Subcontract provisions as to the character of the work or the time of performance; or if Morrin refused to proceed with the work as directed by Burgess or failed to perform the work in accordance with the terms and provisions of the Subcontract Agreement, in whole or in part; or if Morrin failed to perform any terms, covenants or conditions contained in the Subcontract Agreement, Burgess could, at its option and upon three days written notice to Morrin, take over the Morrin work under the Subcontract Agreement and

utilize Morrin's equipment to complete the work remaining to be done.

22. The Subcontract further provided that in the event that Burgess deemed the foregoing takeover procedure necessary, Morrin agreed to pay to Burgess all monies Burgess expended in the completion of the contract over the amount otherwise due Morrin under the contract, with interest thereon at the rate of six percent per annum. Burgess was authorized to withhold monies and funds due to Morrin under the Subcontract payment schedule as a setoff against any damages or costs sustained or incurred by Burgess as a result of Morrin's breach or default.

23. The Subcontract also required Morrin to reimburse Burgess for any consequential loss, damages, or extra expenses paid or incurred by Burgess which were due to Morrin's failure properly to perform all work in keeping with the progress of the general construction work or its failure to properly perform any term, covenant, or condition contained in the Subcontract.

H. Burgess Takeover and Completion of Concrete Work

24. Pursuant to and in accordance with the terms of the Subcontract Agreement, Burgess gave written notice to Morrin on January 17, 1972, that it intended to take over the concrete work on January 21, 1972, and utilize some of the Morrin equipment and materials located on the job site to complete such work.

25. On January 21, 1972, Burgess took possession of certain items of Morrin's equipment and material and thereafter prosecuted the unfinished concrete work to completion in accordance with the express provisions of the Subcontract authorizing such actions.

I. Burgess' Damages

26. Burgess incurred $1,320,628.45 in total direct costs

to complete the Subcontract Agreement after January 21, 1972. This sum is composed of the following elements:

A.	Burgess Direct Costs to Complete Morrin Subcontract After 1/17/71		$1,153,202.48
	Labor, insurance, taxes & fringes	$629,670.32	
	Equipment, ownership, rental, M&R	$168,652.43	
	Materials	$303,614.50	
	Other subcontractor at work	$ 37,475.23	
	Added cost (estimate) to complete balance of subcontract work	$ 13,790.00	
B.	Home Office and Project Overhead at 15.6%		$ 181,312.47
C.	Less: Outside Concrete Sales		-$ 13,886.50
	Total Cost to Burgess to complete Morrin Contract (¶ A + B – C)		$1,320,628.45

27. The total allowable costs for the work covered by the Subcontract prior to January 21, 1972 is composed of the following elements:

A.	Tctal payments made to Morrin under the Subcontract Agreement	$ 520,514.17	
B.	Amount earned by Morrin but unpaid as of January 21, 1972	$ 173,586.57	
C.	Services and supplies furnished by Burgess on Subcontract work	$ 4,264.28	
	Total value of work performed under the Subcontract		$ 698,365.02

28. The total damages sustained by Burgess by reason of Morrin's breach and authorized to be collected by the terms of the Subcontract Agreement is the amount of $330,-345.88, which is computed as follows:

A.	Total direct costs incurred by Burgess to complete the Subcontract Agreement	$1,320,628.45	
B.	Payments to Morrin for work performed under the Subcontract	520,514.17	
C.	Services and supplies furnished by Burgess on Morrin Subcontract work	4,264.28	
	TOTAL		$1,845,406.90
	Less: Subcontract Price as set out in Subcontract		-1,515,061.02
	TOTAL DIRECT BURGESS DAMAGES		$ 330,345.88

29. The stipulated fair market value and replacement cost of equipment belonging to Morrin which Burgess took over pursuant to the Subcontract Agreement and utilized to complete the Subcontract work totals $38,515.16. This amount and the amount of $173,586.57, earned by Morrin but unpaid, are not credited to Morrin because they have not been included in Burgess' costs to complete the Subcontract work.

30. The Subcontract Agreement provides for the payment of interest at the rate of six percent per annum on the amount which Burgess is entitled to recover, which rate of interest is reasonable. Under the Subcontract Agreement, interest is chargeable from the date of billing. The Court finds that in the instant case the billing date did not occur until October 23, 1973, the date on which Burgess formally presented its damages case at trial.

31. Additionally, Burgess claimed consequential damages in the sum of $352,171 in connection with the work it performed in constructing the dam embankment. It claimed that these damages were a direct and natural result of Morrin's breaches and failure to perform its Subcontract. While it appeared that such additional costs were in fact incurred by Burgess, there was a failure by Burgess to prove that such costs were attributable solely to the default of Morrin. Such damages are accordingly not awardable to or recoverable by Burgess.

Having made the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The Subcontract Agreement between the parties was a valid and subsisting contract and controls the rights of the parties.

2. Under the Subcontract Agreement, the sole and exclusive remedy available to Morrin for any delay in being

provided access to the work areas was an extension of time equal to the period of delay.

3. Under the Subcontract Agreement, Morrin was entitled to a time extension to complete the concrete work for diversion until two months after December 27, 1971, that is, until February 27, 1972.

4. Morrin anticipatorily breached the Subcontract Agreement by stating, orally and in writing, prior to January 21, 1972, that it would not perform by February 27, 1972, the concrete work necessary for diversion, and by performing its work prior to January 21, 1972 in such a manner as to be disabled from completing the concrete work necessary for diversion by February 27, 1972.

5. Morrin further breached the Subcontract Agreement by failing to prosecute the work in a timely and efficient manner, by failing to perform the work required in a workmanlike manner, by failing and refusing to proceed with the work in the time and manner directed by Burgess, and by failing to provide Burgess with requested work schedules, all as required by the Subcontract Agreement.

6. Morrin's breaches of the Subcontract Agreement were substantial and material.

7. Burgess was entitled, under the Subcontract Agreement, to take over and complete the subcontract work utilizing the equipment and materials of Morrin.

8. Burgess was damaged as a direct and proximate result of Morrin's breaches in the amount of $330,345.88 and is entitled to recover such sum from Morrin and to judgment therefor.

9. Burgess is not entitled to recover its claim of consequential damages in the sum of $407,109.00 in connection with work performed by Burgess in constructing the dam embankment.

10. Burgess is entitled to recover interest on the sum of $330,345.88 at the rate of six percent per annum from October 23, 1973.

11. Burgess is entitled to recover its allowable costs and disbursements incurred herein.

12. Morrin's complaint in Civil Action C-158-72 and counterclaim in Civil Action C-26-72 should be dismissed with prejudice.

WHEREFORE, having made the foregoing Findings of Fact and Conclusions of Law, let judgment enter accordingly.

DATED this 29 day of Aug., 1974.

BY THE COURT:

WILLIS W. RITTER
Chief United States District Judge

APPENDIX (e)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BURGESS CONSTRUCTION COMPANY, an Alaska corporation, *Plaintiff,* vs. M. MORRIN & SON COMPANY, INC. a Utah corporation; and GENERAL INSURANCE COMPANY OF AMERICA, an insurance company, *Defendants.*	C-26-72
USA/FOR THE USE AND BENEFIT OF M. MORRIN & SON COMPANY, INC., a Utah corporation, *Plaintiff,* vs. BURGESS CONSTRUCTION COMPANY, an Alaska corporation; and GENERAL INSURANCE COMPANY OF AMERICA, a corporation, *Defendants.*	C-158-72 — **JUDGMENT**

The Court having opened, set aside, and vacated the Judgment entered in the above entitled consolidated actions on November 12, 1973, and having annulled, vacated, and set

aside the Findings of Fact and Conclusions of Law entered on that date and having now entered new Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Burgess Construction Company is hereby granted Judgment in Case No. C-26-72 against M. Morrin & Son, Inc. and General Insurance Company of America, jointly and severally, in the sum of $330,345 with interest thereon at the rate of six percent from October 23, 1973 until this date for a total Judgment in the sum of $345,154, together with its costs incurred herein.

2. The Complaint of the United States of America for the use and benefit of M. Morrin & Son, Inc. in Case No. C-158-72 and the Counterclaim of M. Morrin & Son, Inc. in Case No. C-26-72 are hereby dismissed with prejudice and with costs to Burgess Construction Company.

DATED this 29 day of Aug., 1974.

WILLIS W. RITTER, Chief Judge
United States District Court

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

75-1468

No. [redacted]

M. MORRIN & SON COMPANY, INC.,

Petitioner,

v.

BURGESS CONSTRUCTION COMPANY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF RESPONDENT BURGESS CONSTRUCTION COMPANY IN OPPOSITION

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Attorneys for Respondent
BURGESS CONSTRUCTION COMPANY

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---

BRIEF OF RESPONDENT BURGESS CONSTRUCTION COMPANY IN OPPOSITION

Respondent, BURGESS CONSTRUCTION COMPANY ("BURGESS"), hereby files its Brief in Opposition to the petition for a writ of certiorari

filed before this Court by M. MORRIN & SON COMPANY, INC., ("MORRIN"), to review the decision of the United States Court of Appeals for the Tenth Circuit, entered on November 20, 1975, in *Burgess Construction Co. v. M. Morrin & Son Co.*, 526 F.2d 108.

QUESTIONS PRESENTED

BURGESS believes that the following propositions more accurately present the questions before the Court:

1. Whether the trial court's reconsideration and reversal of initial findings of fact, conclusions of law and judgment, entered at the end of nine interrupted trial days filled with conflicting evidence and complex technical testimony and on the understanding that argument by counsel would be deferred until the hearing of post-trial motions, constitutes a denial of due process of law or a departure from the accepted and usual course of judicial proceedings within the meaning of Rule 19, Revised Rules of the Supreme Court, when:

(a) The case and BURGESS' timely post-judgment motions were extensively argued, pursuant to agreement between the court and counsel, after a complete transcript of the trial testimony and the parties' respective briefs were furnished to the court;

(b) MORRIN thereafter presented two supplemental memoranda and further argument was heard by the court;

(c) Alternative sets of proposed findings of fact, conclusions of law and judgment were submitted by BURGESS' counsel to the court on July 18, 1974, and the set more favorable to MORRIN was finally adopted by the court on August 29, 1974;

(d) MORRIN failed to respond or object to the proposed alternative submissions during the nearly six weeks they were under consideration by the court and thereafter, failed to seek post-judgment relief from the trial court;

(e) MORRIN claims a departure by the trial court from the accepted and usual course of judicial proceedings for the first time in its petition for certiorari having failed to raise such question with the trial court or the Court of Appeals.

2. Whether the Court of Appeals' application of *United States v. Howard P. Foley Co.*, 329 U.S. 64 (1946), in its unanimous affirmance of the judgment of the trial court, interpreting a specially framed and individually negotiated contractual provision, conflicts with decisions of the United States Court of Claims and is such an unwarranted extension of these decisions as to justify review by this Court.

STATEMENT OF THE CASE

This litigation arose from the Bureau of Reclamation "Soldier Creek Dam" project on which BURGESS was the prime contractor, and MORRIN was the concrete subcontractor. BURGESS' successful bid was based on its plan to finish construction of the large

earthen dam in two years. Completion within this two year period required diversion of the Soldier Creek river before the Spring of 1972. This critical date was discussed by **MORRIN** and **BURGESS** during contract negotiations and is reflected in a specially worded time for completion provision attached as an exhibit to the subcontract.

Before **BURGESS** could begin constructing the dam, the river had to be diverted through a concrete lined tunnel. Under its subcontract, **MORRIN** was obligated to complete the concrete work required for diversion by August 1, 1971, upon condition that it receive access to work sites by April 1, 1971. The subcontract expressly provided for an extension of time equal to any delay in gaining access. Delays in site access occurred; equivalent extensions of time were allowed, but **MORRIN** was unable to complete the required concrete work in the extended period. The evidence amply established, and the trial court found, that **MORRIN** should have completed the work within the time provided by the contract including extensions, and that its inability to do so was caused by its own poor performance. **MORRIN**'s work was characterized by the testimony of a Bureau of Reclamation inspector as substandard and inefficient.

Due to **MORRIN**'s failure to perform as contractually required, **BURGESS**, on January 21, 1972, exercised its contractual right to complete the **MORRIN** work. **MORRIN** resisted; **BURGESS** then commenced this action to enforce its right to take over

the concrete work and for damages under Section 14 of the subcontract. After suit was initiated, **MORRIN** acquiesced in the take over but subsequently filed a complaint under the Miller Act, alleging breach of contract by **BURGESS** for delays in providing access to work areas. The two actions were consolidated for trial to the court without a jury. **GENERAL INSURANCE COMPANY OF AMERICA**, the surety of both parties, was co-defendant in each case.

Commencing on October 16, 1973, the trial extended to Saturday, November 1, 1973, with nine trial days and an intervening continuance due to illness of the court. The testimony was conflicting and complex. Notwithstanding the voluminous and technical nature of the evidence, the court, immediately on completion of the trial, without permitting argument, ordered counsel for **MORRIN** to prepare proposed findings of fact, conclusions of law and judgment. Declaring that it wanted a judgment entered forthwith, the court stated that arguments would be deferred until **BURGESS**' post-trial motions were presented.

On November 12, 1973, following a brief hearing on attorney's fees, and with the understanding that arguments would await post-judgment motions, the court signed **MORRIN**'s proposed findings of fact, conclusions of law and judgment, giving **MORRIN** a quantum meruit judgment for all its unpaid costs plus overhead and profit of $734,664.00, plus $79,581.00 interest, and $203,557.00 attorneys' fees, for a total judgment of $1,017,802.00.

BURGESS filed timely motions (i) to alter or amend the judgment under Rule 59(e); (ii) for a new trial under Rule 59(a); (iii) to obtain relief from the judgment under Rule 60(b); and (iv) to amend and supplement the findings of fact and conclusions of law under Rule 52. It was agreed that a transcript should be obtained and briefs submitted to the court prior to hearing the motions.

On March 8, 1974, the court and counsel for both parties discussed scheduling the motions. Indicating that it did not believe the motions could be properly heard without the benefit of the full transcript, which was still incomplete, the court stated "the case is far from finished" and added that, having previously been denied the opportunity to argue, the parties would be given the chance to "as thoroughly go into the matter as you desire." Counsel for MORRIN agreed with this procedure acknowledging that it had been outlined by the court at the conclusion of the trial. When the transcript had been completed, counsel stipulated that the motions would be heard on May 9, 1974, with BURGESS submitting a trial memorandum including transcript references on May 1 and MORRIN submitting a responsive memorandum on May 6.

The BURGESS motions were argued for over five hours on May 9. Focusing its attention upon the special "time of performance" provisions of the subcontract, the court carefully reviewed the finding of breach by BURGESS. The court also heard argument on the insufficiency of proof of MORRIN's damages,

and indicated that even if a breach by BURGESS was sustained, MORRIN's testimony on damages might, nonetheless, be inadequate and require further evidence.

MORRIN submitted a supplemental brief, dated May 14. The court ordered further argument on June 28, 1974. Shortly before this second hearing, MORRIN submitted another supplemental memorandum. After argument on June 28, the court announced reversal of the initial decision and ordered BURGESS to submit proposed findings of fact, conclusions of law and judgment.

Two sets of findings of fact, conclusions of law and judgment were submitted by BURGESS on July 18, 1974. While substanially identical, one found damages of $737,454.00 — $330,345.00, the amount BURGESS expended to complete MORRIN's work over the compensation provided by the subcontract, plus $407,-109.00, the amount of consequential damages that BURGESS had sustained because of MORRIN's unduly prolonged performance. The second set of findings did not include consequential damages. MORRIN failed to respond to the submittals. Finally, on August 29, 1974, the court entered the findings of fact, conclusions of law and judgment in the lesser amount of $330,345.00, plus interest with no consequential damages. MORRIN thereafter made no attempt to seek relief from the trial court, but undertook an appeal to the United States Court of Appeals for the Tenth Circuit.

Determining that the evidence was sufficient to support the trial court's findings, the Court of Appeals unanimously affirmed the judgment below. The propriety of the proceedings before the trial court was neither challenged before the trial court nor briefed or argued on appeal.

ARGUMENT

I. MORRIN'S ALLEGATION OF PROCEDURAL IRREGULARITIES IS WITHOUT SUBSTANCE, WAS NOT RAISED BEFORE THE TRIAL OR APPELLATE COURTS AND FAILS TO PRESENT AN ISSUE MERITING REVIEW BY THIS COURT.

MORRIN's petition relies almost entirely upon an argument which is now raised for the first time in the course of this litigation, i.e., alleged impropriety by the trial court, which, it is claimed, justifies exercise of this Court's supervisory powers. Shorn of all rhetoric and in light of the record, the claimed impropriety reduces itself to two essential allegations: (1) the trial court reconsidered and reversed its initial decision; and, (2) in so doing, it entered, without due consideration, findings, conclusions and a judgment drafted by counsel for BURGESS. The second allegation is erroneous and presents no basis for reversal. Neither allegation constitutes a departure from accepted or fair procedure; neither warrants review by this Court.

A. *The Trial Court's Reconsideration and Reversal of Initial Findings, Conclusions and Judgment Did Not Constitute a Departure From the Accepted and Usual Course of Procedure Within the Meaning of Rule* 19 *or a Denial of Due Process of Law.*

MORRIN's petition implies that the proceedings below were tainted because a decision was "summarily announced from the bench" and substituted findings and conclusions were entered "without hearing or modification."[1] This implication is erroneous. Indeed, ironically, the only decision "summarily announced from the bench" was the initial one later reconsidered by the court. The only findings and conclusions which were entered without the benefit of argument were those drafted by MORRIN's counsel and subsequently vacated. The final findings and conclusions were made and entered after both counsel and the court had the benefit of a complete transcript of evidence; after both parties were accorded full oral argument; after several extensive briefs were filed and considered; and after the court considered for six weeks before signing the proposed findings, with no motion, response or objection from MORRIN to the trial court during that six week period or thereafter.[2]

Certainly no departure from accepted procedure occurs when a trial judge reconsiders and vacates, or otherwise modifies earlier findings, conclusions and judgment. To maintain otherwise would eviscerate those

[1] MORRIN's petition at 6.
[2] The opinion of the Court of Appeals sets forth the procedural sequence. See 526 F.2d 108, 110-11.

provisions of the Federal Rules of Civil Procedure which specifically provide the machinery for accomplishing that very result.[3] Equally certain is that no denial of due process occurs when a litigant has been afforded the ample opportunity to present and to have its case carefully considered that **MORRIN** has here enjoyed. Only after extensive briefing and argument and thorough review following **BURGESS'** timely post-judgment motions, did the court, finally with the aid of a complete transcript of the evidence, determine to vacate the initial findings, conclusions and judgment.

MORRIN however argues that because of inconsistencies between the trial court's initial findings and comments on the evidence during trial and its subsequently entered findings it was somehow deprived of due process of law. The Court of Appeals stated correctly that:[4]

> The fundamental issue in this appeal is whether Burgess was contractually bound to give Morrin access to work sites on the dates stated in the contract.

That issue has been fundamental throughout this litigation. Manifestly, the trial court's initial findings with respect to breach by **BURGESS**, seasonal conditions contempleted for **MORRIN**'s work, **BURGESS'** liability for increased costs, **MORRIN**'s performance and **BURGESS** termination thereof would all be materially altered by its resolution of that critical issue. Alteration of initial findings concerning disputed and in-

[3] Fed. R. Civ. P. 52, 59(a) and (e), 60(b).
[4] 526 F.2d at 112.

tricate evidence, which were revealed, in light of extensive briefing, argument and consideration, to have been in error is no deprivation of due process, but rather essential to it and the duty of a scrupulous and responsible trial court.

B. ***The Trial Court's Ultimate Adoption of Findings and Conclusions Drafted by Counsel was the Result of Extensive Consideration and Independent Judgment; Those Findings are Amply Supported by the Evidence and were Correctly Upheld by the Court of Appeals.***

Because findings and conclusions, consistent with the trial court's decision, were prepared by counsel and ultimately entered without modification, **MORRIN** asserts that the trial court abdicated its responsibility and mechanically relied upon counsel's handiwork in a manner violative of due process.[5] However, the procedural sequence culminating in the eventual entry of one of two alternative sets of findings and conclusions after six full weeks consideration refutes any such assertion. Indeed this sequence of events dramatically demonstrates that the ultimate decision was the independent and considered judgment of the trial judge after having "considered the case from all angles . . . *before* placing reliance on the proposed findings." *Louis Dreyfus & Cie. v. Panama Canal Co.*, 298 F.2d 733, 738 (5th Cir. 1962). This is apparent in the trial court's final comments:

[5] The initial findings and conclusions were prepared by MORRIN's counsel after the conclusion of evidence on Saturday, November 10, 1973, and signed verbatim by the court on Monday, November 12, 1973.

> THE COURT: Alright, thank you very much. I have had you down here several times, and I think I have really gotten the grasp of this situation. This is my best judgment.

Thus, the initial position the trial court had summarily taken was reversed only after careful consideration was given to the extensive briefs and lengthy argument of counsel presented with the benefit of the full transcript.

In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964), this Court held that even though the findings were "adopted verbatim . . . [and] though not the product of the workings of the district judge's mind, [they] are formally his; . . . and they will stand if supported by evidence." The Court of Appeals for the Fifth Circuit placed this concept in practical perspective:

> In the workaday world, however, it may often be necessary for a hard-pressed district court to take assistance from counsel in articulating his decision. . . . The ultimate question that the judge must face is whether to enter judgment for plaintiff or defendant, and he must decide this question on his own before deciding which proposed findings to accept. Since his mind must range over the same questions to make this decision that it would to write the findings the result will be the same, and his factual determination should, as in any other case, be set aside only if clearly erroneous.
>
> * * *
>
> When substantial evidence supports a finding it will not be found erroneous merely because the expression of the finding was adopted from a proposal by counsel. (Citation omitted).

Louis Dreyfus, supra at 738-39. *Accord, Professional Golfer's Ass'n v. Bankers Life & Casualty Co.*, 514 F.2d 665 (5th Cir. 1975); *Schwerman Trucking Co. v. Gartland S.S. Co.*, 496 F.2d 466 (7th Cir. 1974); *Nissho-Iwai Co. v. Star Bulk Shipping Co.*, 503 F.2d 596 (9th Cir. 1974). Likewise, no denial of constitutional safeguards occurs merely because the trial court sought assistance of counsel in preparation of findings and conclusions consistent with its considered decision. Responding to an argument similar to that now advanced by MORRIN, Justice (then Judge) Blackmun held that the adoption of findings, initially drafted by counsel, if supported by the evidence and drafted in a careful, specific manner, constituted

> . . . no abandonment of the judicial process and certainly nothing which approaches the level of a deprival of constitutional due process. The findings and conclusions, accordingly, are entitled to their usual weight.

Bradley v. Maryland Casualty Co., 382 F.2d 415, 423 (8th Cir. 1967).

The Court of Appeals noted that "the evidence was conflicting in varying degrees on every major point and contention."[6] In asserting that certain findings are clearly erroneous, MORRIN's petition distorts the testimony and completely disregards the evidence adduced by BURGESS and, thus is based on the untenable premise that the operative facts are to be determined exclusively from MORRIN's evidence rather

[6] 526 F.2d at 116.

than the entire record. As the Court of Appeals suggested: "Were we to look only at MORRIN's evidence, we might be able to agree with its contentions, but we must look at the whole record."[7]

Correctly applying this fundamental principle, the Court of Appeals reviewed and upheld the trial court's findings and conclusions including each of the four "critical" findings and conclusions now claimed erroneous by MORRIN.[8] The Court of Appeals found MORRIN's assertion (a), relating to time of completion of site preparation work to be without merit because delays in all work areas except the relatively small gate chamber area were insignificant and that "the gate chamber was available for pouring concrete . . . on December 7, 1971";[9] its assertion (b), relating to the availability of extensions by reason of winter work,[10] to be unfounded because the "evidence also indicated winter work was contemplated when the contract was entered, . . . winter work did not materially change the nature of MORRIN's performance",[11] and delays resulting in winter work were due to MORRIN's own inefficiencies.[12]

Assertion (c), relating to increased costs to MORRIN for changes and changed conditions allegedly resulting from site access delay, was held to be without

[7] Id.
[8] MORRIN's petition ¶5, at 9-10.
[9] 526 F.2d at 116.
[10] It should be noted, contrary to MORRIN's assertion, that the trial court in its initial findings never found that **force majeure** conditions existed.
[11] Id. at 112.
[12] Id.

significance because the increased costs were also due to MORRIN's inefficiencies and poor performance, no contractual claims were made and BURGESS did not breach the subcontract. As the Court of Appeals noted, not only was there "no contention that BURGESS acted in bad faith, "but also the evidence established that BURGESS' "delay was not unreasonable or due to its fault," and "that it was not the intent of the parties to bind BURGESS to pay damages should delay . . . occur."[13]

Assertion (d), relating to MORRIN's claimed setoff, was summarily disposed of by the Court of Appeals for it was obvious that a setoff was, in effect, allowed MORRIN for $173,586.57, the amount earned but unpaid as of January 21, 1972, the date of termination. This offset was not separately delineated because it was not included in Finding 28B as an item of BURGESS' damage, viz., "Payments to MORRIN for work performed under the Subcontract" having never been paid. If said amount had been included as an item of damage, it would have been proper to include it as an offset, due MORRIN, with the resulting damage figure of $330,345.88 remaining unchanged.

Contrary to MORRIN's claim,[14] counsel for BURGESS never acknowledged that MORRIN was entitled to additional costs as a result of scheduling changes. Moreover, as the Court of Appeals noted, the evidence was clear that MORRIN's schedule of oper-

[13] 526 F.2d at 115.
[14] MORRIN's petition at 4.

ations was for the convenience of **BURGESS** in coordinating the overall construction. It did not guarantee that **MORRIN** would be allowed to work in the sequence its schedule proposed.[15] Finally, **MORRIN** was not wrongfully denied recovery for additional work because, in fact, it performed no significant additional work.[16]

This case presents no basis for grant of certiorari. The trial court did not depart from the accepted and usual course of judicial proceedings; the record compellingly shows that the decision of the trial court was based upon its own carefully considered, independent judgment after extensive opportunity to be heard was afforded both parties. Scrutinizing the record as a whole and not just **MORRIN**'s evidence, the Court of Appeals applied the proper standard of review determining that there was substantial evidence supporting each of the findings which **MORRIN** assailed as clearly erroneous. Further review by this Court is unwarranted.

II. THE APPLICATION BY THE COURT OF APPEALS OF *UNITED STATES v. HOWARD P. FOLEY, SUPRA*, IS CORRECT UNDER THE FACTS OF THE INSTANT CASE; IS CONSISTENT WITH U.S. COURT OF CLAIMS DECISIONS, AND DOES NOT PRESENT A SIGNIFICANT QUESTION WARRANTING REVIEW BY THIS COURT.

[15] **526 F.2d at 116.**
[16] **Id.**

In a cursory manner, **MORRIN** next asserts that certiorari is justified because *United States v. Howard P. Foley, Co., supra*, is not apposite to the facts of this case and has been applied contrary to its express limitations. However, *Foley*'s holding that delay in providing site access does not constitute a breach when an extension of time provision provides the contractor's sole remedy, is patently applicable here. Further, as the trial court found, **BURGESS** made no promise relative to site access other than to grant a time extension equal to the time that access was delayed beyond April 1, 1971. Delays contemplated in the contract clearly did not constitute a breach, but merely non-occurrence of conditions,[17] entitling **MORRIN** to a time extension which it received.

After careful review, the Court of Appeals rejected **MORRIN**'s contentions with respect to *Foley*.[18]

MORRIN further contends that the Court of Appeals' decision conflicts with three decisions of the Court of Claims: *H. R. Henderson & Co. v. United States*, 169 Ct. Cl. 228 (1965); *Abbett Electric Corp. v. United States*, 142 Ct. Cl. 609, 162 F. Supp. 772 (1958); *George A. Fuller Co. v. United States*, 108 Ct. Cl. 70, 69 F. Supp. 409 (1947). Examination of these cases, however, reveals that they are obviously distinguishable, presenting no conflict.

Henderson involved a claim for increased costs resulting from construction sequence changes. No allega-

[17] **526 F.2d at 113.**
[18] **See Id. at 114-15.**

tion was made that the sequencing changes constituted a breach of contract. The only issue was the claimant's right to extra compensation pursuant to the changes clause of the contract. Here, however, **MORRIN** claimed breach and asserted no claim for extra compensation under the contract. Moreover, while **MORRIN** did submit a proposed schedule, it was expressly subject to approval and modification by **BURGESS.**

In *Abbett*, a contractor sued to recover increased costs for the installation of a transmission line. Unlike *Foley* and the case at bar, the Government in *Abbett* did covenant to give notice within a certain time to the contractor to proceed with its work.[19]

Fuller, like *Foley*, involved application of the principle that unreasonable delay violates an implied obligation not to hinder or delay the other parties' performance, absent a contractual provision contemplating and excusing the delay, such as is here involved. In *Fuller*, however, the court was careful to note that no such provisions were present and that the Government had agreed to furnish the models needed by the plaintiff contractor for its performance "without condition" and "as soon as the contractor needed them".[20] The Court of Appeals was cognizant of these distinguishing factors when it cited *L. L. Hall Construction Co. v. United States*, 177 Ct. Cl. 870, 379 F.2d 559, 563 (1966), as having harmonized *Fuller* and *Foley* under the following rule:[21]

[19] 162 F. Supp. at 773.
[20] 69 F. Supp. at 415.
[21] 526 F.2d at 114.

> [T]he questions on which liability turns . . . are whether defendant was the cause of the delay here, whether it failed to use reasonable diligence and good faith in performance of its responsibilities under the contract, and whether the contract contemplated and excused the delays.

Applying this rule to the facts here presented, the Court of Appeals concluded that the trial court's holding that the subcontract contemplated delay and that **BURGESS** was not liable for damages resulting therefrom, was supported by the evidence and should be affirmed. Further, it said that even if the extension of time was not the sole remedy, **MORRIN** still could not recover because **BURGESS** acted in good faith, its delay was not unreasonable or due to its fault and, therefore, did not constitute a breach of an implied promise not to hinder or delay the subcontractor.[22] Thus, the decision below is fully consistent with *Foley* and progeny and correct under the facts of this case.

MORRIN's final assertion that this case will have a "drastic impact" upon government contractors because the trial court erroneously construed a standard contract provision[23] is substanceless. The special provision at issue here setting forth the time of performance of the subcontract, conditioned upon the date of delivery of sites, was specifically negotiated by the parties and set forth in a separate exhibit attached to the subcontract.[24] Therefore, **MORRIN**'s suggestion that the court in-

[22] **Id.** at 115.
[23] **MORRIN**'s petition at 11.
[24] 526 F.2d at 114 n.3.

terpreted a standard contractual provision in a manner raising broad ramifications for the construction industry is incorrect.

The well reasoned decision of the Court of Appeals is thus not only fully supported by the evidence adduced at trial and consistent with the decisions of this Court and those of the other circuits, but also presents no conflict with the above cited Court of Claims cases and raises no question of general significance warranting this Court's review.

CONCLUSION

For the foregoing reasons the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1463

HERBERT W. CABBLER,

Petitioner,

v.

SUPERINTENDENT, VIRGINIA STATE PENITENTIARY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Superintendent of the Virginia State Penitentiary, an employee of the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the court below, i.e., petitioner and respondent, or by their respective positions in the state trial court, i.e., defendant and Commonwealth.

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit commit error in denying and dismissing a petition

for a writ of habeas corpus on the ground that the seizure of evidence from the trunk of petitioner's vehicle during an inventory of the contents of such vehicle while impounded by the Roanoke, Virginia, police department was not a violation of petitioner's Fourth Amendment rights?

STATEMENT OF THE CASE

The petitioner was convicted in the Circuit Court of the City of Roanoke, Virginia, on February 21, 1970, of three counts of grand larceny and two counts of petty larceny, pursuant to trial by jury, and was sentenced to a total of eleven years in the Virginia State Penitentiary. Prior to petitioner's trial, he moved to suppress certain evidence obtained by officers of the Roanoke City Police Department from the trunk of his automobile, which items of evidence were eventually used in petitioner's trials and were the basis for his conviction. A hearing was held on said motion to suppress and the motion to suppress was overruled. All of the evidence relating to whether or not said evidence was obtained as the result of an illegal search and seizure was developed at the hearing on the motion to suppress.

Following petitioner's convictions, he appealed to the Virginia Supreme Court by way of direct appeal, assigning as error, along with other matters, the admission in evidence of the items found in the trunk of his car on the basis of an allegation of illegal search and seizure. Petitioner's conviction was affirmed, and the admission into evidence of the items removed from the trunk of petitioner's car was found not to be an illegal search and seizure by the Virginia Supreme Court on direct appeal. *Cabbler* v. *Commonwealth,* 212 Va. 520, 184 S.E.2d 781 (1971).

Petitioner then appealed to this Court by way of a petition for a writ of certiorari, and said petition for a writ of

certiorari was denied by an order entered April 17, 1972, 405 U.S. 1073 (1972).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court, Eastern District of Virginia, Richmond Division, alleging that the goods taken from the trunk of his car and admitted into evidence at his state court trial were taken pursuant to an illegal search and seizure and, therefore, were improperly admitted. Respondent filed a responsive pleading asserting that said allegation was without merit and that the stolen property used in petitioner's trial was not obtained as the result of an illegal search and seizure, but was obtained as a matter of proper procedure by the Roanoke Police Department as a result of the inventory of the petitioner's impounded automobile.

The District Court granted the petition for a writ of habeas corpus by a memorandum opinion and order dated April 23, 1974, 374 F.Supp. 690 (E.D. Va. 1974), on the basis that said search and seizure was in violation of petitioner's constitutional rights under the Fourth Amendment to the United States Constitution. Upon appeal by the respondent, the United States Court of Appeals for the Fourth Circuit reversed the district court. It is from this decision that the petitioner is applying for certiorari.

As pointed out above, all of the facts relating to the seizure of certain items from the trunk of petitioner's automobile, which items were subsequently determined to be stolen and were used to obtain the convictions of the petitioner, were presented to the state trial court through a hearing on a motion to suppress said evidence.

Those facts showed that in the early morning on September 2, 1969, Roanoke, Virginia, City Police officers were looking for the petitioner because they knew that the victim of an alleged felonious shooting into an occupied building

was on his way to swear out a warrant for the petitioner. The petitioner's car was spotted by police officers in downtown Roanoke and was followed to the Community Hospital of Roanoke Valley, where the petitioner had parked his car in a "No Parking" zone and in a position which partially blocked the driveway to the emergency room of said hospital and the entranceway used by emergency vehicles attempting to get to the emergency room entrance. It was agreed that all of the area in question where the petitioner's vehicle was parked is private property in which parking and traffic regulations are made by the hospital management.

The petitioner and a passenger in the car alighted and went into the emergency room. Police Sergeant R. C. Reynolds observed a pistol and boxes of ammunition in the back seat and back floor board of the car and stationed a police officer to guard the car while, he, Sergeant Reynolds, went inside the hospital. After going into the hospital, Sergeant Reynolds called the magistrate on duty and determined that a felony warrant had been issued for the petitioner. He then proceeded to arrest the petitioner in the hospital emergency room where the passenger, who had gotten out of the car with the petitioner, was undergoing medical treatment. As the petitioner was arrested, he was advised of his Constitutional rights and was handcuffed and was taken out of the hospital emergency room to a nearby police car.

It was starting to rain as the petitioner and Sergeant Reynolds left the emergency room, and the petitioner asked Sergeant Reynolds to roll up his car window, indicating the 1967 Cadillac in which the pistol and ammunition had already been seen. The car keys were removed from the defendant's pocket at this time, and then Sergeant Reynolds took the petitioner to the police car and proceeded to roll up the car windows. It was necessary to get the key from

the petitioner, because the windows were of the push button type and the ignition had to be turned on in order to roll up the windows.

Sergeant Reynolds went to the petitioner's car, closed the windows, removed the pistol and ammunition, and stationed another officer to guard the car until he could return. At this time Sergeant Reynolds advised the petitioner that his car would be taken to the city garage and stored there for him until he was able to post bond on the felony charge for which he was being arrested. Sergeant Reynolds then drove the petitioner to the municipal building to be "booked" and turned him over to other police officers. Sergeant Reynolds was driven back to the Community Hospital where he got into the petitioner's Cadillac automobile and drove it to police headquarters.

While parked outside the Roanoke Municipal Building, Sergeant Reynolds opened the trunk of the petitioner's automobile with the keys he had obtained from the petitioner. His intention at that time was not to search for evidence of any crime, but merely to remove any personal property or other valuables from the car and to store them in the Police Department property room, located in the main Municipal Building. Upon seeing a large quantity of clothing and other personal items in the trunk of the car, Sergeant Reynolds quickly concluded that the property room in the main Municipal Building was too small for his purposes, so he drove the car a block away to a point beside the Municipal Building Annex in which the Police Department's larger, principal property room is located.

There, Sergeant Reynolds and several other officers systematically removed and tagged for identification the numerous items of clothing and personal property which constituted the contents of the trunk of the petitioner's automobile. All of this property was guarded by a police officer

until the property officer arrived later that morning. It was then stored in the main property room. Some of this property, which was never claimed by the petitioner upon his release from custody, turned out to have been stolen and was introduced at the petitioner's trial as evidence against him.

Each of the officers who participated in the guarding and inventorying of petitioner's automobile testified at the hearing on the motion to suppress. None of these officers testified that the purpose of the inventory was to "Search" for evidence of any crime or to perform any function other than finding, identifying, and storing the petitioner's valuables for safekeeping while he was in custody and while his car was in the possession of the Police Department. None of these officers heard the defendant protest the police officers taking temporary custody of his vehicle or any offer by the petitioner to have the car moved from its hazardous location by any other means.

The evidence was uncontradicted that the inventory of the petitioner's automobile was conducted solely to safeguard the petitioner's valuables and was conducted pursuant to long-standing practices of the Roanoke Police Department. Several officers testified as to the circumstances under which it was their practice to take temporary custody of property, such as vehicles belonging to arrested individuals, and numerous illustrations were given. The evidence in this regard was that whenever a person is arrested away from his home under circumstances in which valuable personal property will be left "stranded" as a result of the actions of the police in making the arrest, and no other measures to safeguard the valuables are apparently available, the police will take into temporary protective custody such items of personal property, including automobiles, and will store them in an appropriate place, pending release of the ar-

rested individual from custody. Because of certain unfortunate instances of theft in the past, the police officers had been instructed not to surrender custody of automobiles so impounded to personnel at the City Garage until an itemized list of the automobile's contents had been made, and such contents had been removed and stored for safekeeping in one of the Police Department property rooms. The original taking into custody of the arrested person's property does not turn on whether the property is located on public or private property at the time of the arrest, so long as the fact of the arrest itself would leave the property unprotected if the police were not to assume custody of it. In at least one instance in the past, the Police Department had been subjected to civil suits upon claims for property having disappeared during the time that an automobile was in police custody, and the evidence was that the petitioner himself had made such a claim prior to the actual initiation of these criminal proceedings concerning this particular impoundment of his automobile.

There was no evidence that the above-stated policy, which had at least once in the past been reduced to writing and promulgated by the Chief of Police, though such written regulations could not be found, had been applied in this or in any other case in a discriminatory manner, nor was there evidence that the officers in the instant case were not acting in a good faith effort to execute such policies. There was no evidence that the arrest of the defendant was any kind of a "sham" or pretext for "searching" his automobile, or that even the initial taking of the car into custody was done upon such pretext. Rather the impoundment of the vehicle was for the stated purposes of eliminating the emergency traffic hazard posed by the car in its location, as it had been left parked by the petitioner, and for the pro-

tection of the petitioner's own personal property from theft by others.

LAW AND ARGUMENT

Initially, the respondent submits that the removal from the petitioner's automobile by the police of the items of personal property was not a "search" in the Constitutional sense, because the police were not looking for evidence of any particular crime. A search, within the confines of the Fourth Amendment, implies some exploratory investigation. A "search" in the Constitutional sense implies an invasion and quest, a looking for or seeking out; prying into hidden places for that which is concealed. There was no "search" in the instant case, but only a taking of the articles into protective custody. There is no search where the officers are engaged in legal, non-search activity, and items are observed in plain view. See *People* v. *Norris,* 68 Cal. Rptr. 582 (1968); *State* v. *Dombrowski,* 171 N.W.2d 349 (Wisc. 1969); *State* v. *Wallen,* 185 Neb. 44, 173 N.W.2d 372 (1970).

In the instant case the taking into custody of the petitioner's vehicle was in no way connected with his arrest for a shooting incident, but was done in order to remove it from obstructing the entrance to the hospital, and to protect it while the defendant was in custody. It was done as a matter of standard operating procedure of the Police Department, and the police had no intention at any time of trying to use the automobile or its contents as a part of any criminal charges against the petitioner.

The same applies to the removal of the goods from the trunk of the car and the placing of them in the police property room. At no time during this procedure did the police have any intention other than the protection of the petitioner's property, and it was all done pursuant to longstanding Police Department policy. Having lawfully taken charge of the defendant's automobile, it was incumbent upon the police to ascertain its contents and to store them safely. To protect themselves as well as the defendant, a reasonably prudent officer could and should have made an itemized list of all valuable personal property in the car.

It has been recognized by this Court that every physical intrusion into a citizen's property does not imply a "search" of that property, if that is not the intent of the officer making the entry. *Harris* v. *United States,* 390 U.S. 234, 19 L.Ed.2d 1067, 88 Sup.Ct. 992 (1968). In that case the investigating officer discovered evidence against the accused while opening the door of his car in order to protect the car from the rain. While it was held that this was specifically not a case involving the inventory of the contents of a vehicle, it is still an extremely analogous case, because it involves evidence obtained while attempting to protect the property of an individual who is in custody, and not as a part of any search. The intent in each situation is very important. As said by the Court in the *Harris* case:

> ". . . the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances."

It would appear clear that this language in *Harris* is still viable and that the question is still open as to whether activity of the police, such as in the instant case, is even a "search" in the first place. See *Cady* v. *Dombrowski,* 413 U.S. 433, 37 L.Ed.2d 706, 93 Sup.Ct. 2523 (1973), footnote at 413 U.S. 442.

Both the District Court and the Fourth Circuit in the

instant case recognized that this argument has some validity, but did not rely on such for their respecive holdings for differing reasons. In particular the Fourth Circuit implied that it could have reversed the District Court on the basis that this situation did not involve a Fourth Amendment search, but it was not necessary to do so.

The petitioner attempts to reject this proposition, as did the District Court, primarily on the authority of *Camara* v. *Municipal Court,* 387 U.S. 523, 18 L.Ed.2d 930, 87 Sup.Ct. 1727 (1967), and its progeny. The respondent submits that this reliance is misplaced, not only because the factual situations are so entirely different, but furthermore because the language in *Harris* referred to above is much closer to the factual situation in the instant case than is the language in *Camara.* This Court has consistently held that there are situations which are, in fact, not searches in the Constitutional sense, and the respondent submits that the instant case is, in fact. one of those cases, and that the language of *Harris* v. *United States, supra,* is determinative of that.

Assuming arguendo that the taking of the personal property from the trunk of the petitioner's car was a search, then the question becomes one of whether the search conducted in the instant case was reasonable. No attempt has ever been made by the Commonwealth to justify this search on the grounds of a search incident to an arrest or the grounds of having probable cause therefor. The Commonwealth has consistently maintained that the taking of the personal property from the petitioner's automobile was pursuant to a proper police procedure for inventorying the contents of automobiles of persons taken into custody, and that such an inventory search is *reasonable* and not a violation of petitioner's Fourth Amendment rights. This is, in effect, the classic example of so-called "inventory searches."

Respondent submits, as concluded by the Court of Ap-

peals, that the instant case is clearly controlled by the decisions of this Court in *Harris* v. *United States, supra* and *Cady* v. *Dombrowski, supra.* Although the language of the opinion in *Harris* indicates that it is not to be construed as a determination of the admissibility of evidence found as a result of a *search* under such a Police Department regulation, the respondent submits that from a practical and factual standpoint there is nothing to distinguish the instant case from *Harris* v. *United States.* In both cases the action taken by the police department was action taken solely and totally for the purpose of protecting the property of a person who was in custody and who was incapable of protecting his own property. The action taken by the police in both cases was reasonable and was calculated as to be appropriate action that would have been demanded by the person in custody if the Police Department had not done it. Once the Police Department was taking such protective action, the seizing of contraband or other items of evidence was not an illegal search and seizure.

Even greater similarity can be found between the facts in the instant case and the facts in *Cady* v. *Dombrowski, supra.* In that case, the Court found two factual considerations deserving of emphasis. The first was that the police had exercised a form of custody or control over the defendant's vehicle for the purpose of safety and protection and, secondly, the opening of the trunk of that vehicle and the seizing of items of personal property therein was standard procedure in the Police Department to protect the citizens and the public. Both of these same factual considerations are present in the instant case. In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cady* the justification for the intrusion into the vehicle was concern for the safety of the general public. In the instant case, the motivation on the part of the of-

ficers in taking an inventory of the contents of the trunk of defendant's vehicle was at least as viable and reasonable a motivation as those. Respondent submits that the opinion in *Cady* v. *Dombrowski, supra,* sufficiently shows that the search of the petitioner's trunk in the instant case was a reasonable search and, therefore, not a violation of the Fourth Amendment strictures on search and seizure.

Not only is the instant case controlled by *Harris* and *Cady* v. *Dombrowski,* but it also is directly in line with other decisions of federal courts upholding inventory searches as reasonable where conducted for the two-fold purpose of protecting the defendant's property and safeguarding the police from groundless claims for loss of possessions. *United States* v. *Kelehar,* 470 F.2d 176 (5th Cir. 1972); *Barker* v. *Johnson,* 484 F.2d 981 (6th Cir. 1973); *United States* v. *Mitchell,* 458 F.2d 960 (9th Cir. 1972); *United States* v. *Pennington,* 441 F.2d 249 (5th Cir. 1971); *United States* v. *Boyd,* 436 F.2d 1203 (5th Cir. 1971); *United States* v. *Lipscomb,* 435 F.2d 795 (5th Cir. 1970); *Kimbrough* v. *Beto,* 412 F.2d 981 (5th Cir. 1969); *Cotton* v. *United States,* 371 F.2d 385 (9th Cir. 1967).

In *Barker* v. *Johnson, supra,* the defendant was arrested and was in custody and his car was parked in front of the police station. The car was opened by the police in order "too inventory the valuables, to roll up the windows, and to lock this car for the sole purpose of protecting the car and its contents while the owner was in lawful custody." The court found that this was a proper police function under *Harris* and that the contraband which was eventually seized was in plain view once the officers were inside the automobile, a place where they had a right to be. Respondent submits that the reasoning applied in that case is just as applicable to the instant case.

The practice of protecting whatever valuables may be in an impounded vehicle by storing them in the police station is not only reasonable, but it is also in the public interest where it is not used as a subterfuge to conduct a search without a warrant. It is not unusual for items to disappear from parked vehicles in spite of locked doors. The Fourth Amendment does not proscribe *all* searches, but only those that are unreasonable. When an inventory is performed as a service to an individual, evidence of a crime accidentally discovered need not be suppressed.

In at least two cases cited above, *United States* v. *Lipscomb, supra,* and *United States* v. *Boyd, supra,* the Court talks in terms of the police officers, in fact, owing a *duty* to inventory the contents of impounded vehicles. These statements are to the effect that the inventory is necessary to protect the property of the person in custody and to safeguard the police from groundless claims for loss of possessions. Once the car is taken to the police headquarters, the police are under a *duty* to itemize the property contained therein and store it for safekeeping. See also *Cotton* v. *United States, supra; Heffley* v. *State,* 423 P.2d 666 (Nev. 1967); *State* v. *Wallen, infra.*

It is obvious that in inspecting vehicles they take into custody, the police are not seeking evidence of crime, but are pursuing precautions which any bailees of personal property would be expected to take as a matter of reasonable care for the benefit of the absent owner of the vehicle and as a safeguard against claims of loss or damage. In the instant case, to say that they could have been less careful and locked it up and left it on the hospital lot, or towed it to the impoundment lot without conducting the inventory of the contents does not make their more cautious and more careful action and their greater care unreasonable or unconstitutional.

The District Court, and the petitioner herein, place great emphasis on *United States* v. *Lawson,* 487 F.2d 468 (8th Cir. 1973). Respondent says that reliance upon *Lawson* is no more apropos to the instant case than is reliance upon all of the other cases cited by the respondent. In fact, the court in *Lawson* specifically found that the police had no right to impound the vehicle in question in the first place. It was on a motel parking lot, was not obstructing anything, and no request from the defendant had been made to protect it in any way. These same factors were used by the court to distinguish the situation in *Lawson* from the situation in *Cady* v. *Dombrowski.* Yet, the petitioner in the instant case attempts to avoid the import of *Cady* v. *Dombrowski* by stating that said case does not indicate that the requirement of reasonableness is any way mitigated. Respondent agrees with this statement and that there is still a requirement of reasonableness, but submits that in *Cady* v. *Dombroski, supra,* this Court placed its stamp of approval on inventory searches of automobiles where the ultimate standard of reasonableness is met. Respondent submits that such standard of reasonableness has been met in the instant case. By the same reasoning, since *United States* v. *Lawson, supra,* is distinguishable factually from the instant case, it does not indicate any real conflict between the lower courts on the real issue of inventory searches.

Respondent further submits that the upholding of reasonableness of the inventory search in the instant case is directly in line with the overwhelming weight of authority of those decisions by state courts which have upheld inventory searches of automobiles. *Plitko* v. *State*, 11 Md.App. 35, 272 A.2d 669 (1971); *St. Clair* v. *State,* 1 Md.App. 605, 232 A.2d 565 (1967); *State* v. *Hock,* 54 N.J. 526, 257 A.2d 699 (1969); *People* v. *Norris,* 68 Cal. Rptr. 582 (1968); *People* v. *Sullivan,* 29 N.Y.2d 69, 272 N.E.2d 464 (1971);

State v. *Dombrowski,* 171 N.W.2d 349 (Wis. 1969); *State* v. *Wallen,* 185 Neb. 44, 173 N.W.2d 372 (1970); *People* v. *Willis,* 46 Mich. App. 436, 208 N.W.2d 204 (1973) (dictum); *Heffley* v. *State,* 423 P.2d 666 (Nev. 1967); *State* v. *Montague,* 73 Wash.2d 381, 438 P.2d 571 (1968); *State* v. *Criscola,* 21 Utah 2d 272, 444 P.2d 517 (1968); *People* v. *Trusty,* 516 P.2d 423 (Colo. 1973); *Denson* v. *State,* 128 Ga.App. 456, 197 S.E.2d 156 (1973); *Godbee* v. *State,* 224 So.2d 441 (Fla. 1969); *Jackson* v. *State,* 243 So.2d 396 (Miss. 1971); *State* v. *Gwinn,* 301 A.2d 291 (Del. 1973). See contra: *Mozzetti* v. *Superior Court,* 94 Cal. Rptr. 412, 484 P.2d 84 (1971); *Boulet* v. *State,* 17 Ariz. App. 64, 495 P.2d 504 (1973).

CONCLUSION

For the reasons set out herein, and set out in the opinion of the Fourth Circuit, it is submitted that no error was committed by the state trial court or by the Fourth Circuit Court of Appeals, and no substantial reasons exist for the granting of certiorari and that the petition for a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 24th day of June, 1976, three copies of this brief were mailed to Samuel W. Tucker, Hill, Tucker & Marsh, 214 East Clay Street, Richmond, Virginia 23220, and to Gerald G. Poindexter, Poindexter and Poindexter, 304 West Cary Street, Richmond, Virginia 23220, counsel for the petitioner.

GILBERT W. HAITH
Assistant Attorney General

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1468

M. MORRIN & SON COMPANY, INC.
Petitioner

v.

BURGESS CONSTRUCTION COMPANY, and
GENERAL INSURANCE COMPANY OF AMERICA
Respondents

REPLY BRIEF OF PETITIONER

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SUBJECT INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1468

M. MORRIN & SON COMPANY, INC.
Petitioner
v.
BURGESS CONSTRUCTION COMPANY, and
GENERAL INSURANCE COMPANY OF AMERICA
Respondents

REPLY BRIEF OF PETITIONER

ARGUMENT

Petitioner ("Morrin") files this Reply Brief because it is concerned that the Court may be misled as to the issues that justify the issuance of a Writ of Certiorari in this case by the simplistic characterization of such issues in Respondent's Brief in Opposition. In particular, Respondent ("Burgess") portrays Morrin's objections to be those of a disappointed loser whose judgment in damages was vacated and who was subjected to an adverse judgment on the basis of post-judgment legal arguments. If that characterization of the case were correct, no procedural irregularity would indeed exist. The error of that characterization can only be seen by an examination of the entire record; Petitioner seeks certiorari in the belief that the record, when examined, will show:

1. That the trial court clearly perceived the facts favorably to Morrin as shown by its comments and the admissions of Burgess throughout the trial. On the basis of such perceptions and admissions the court directed that findings, conclusions and judgment be prepared by and for Morrin at the

close of trial.[1] The flavor of the court's position on the facts is shown by excerpts from the transcript appended hereto as Appendix A.

2. On March 8, 1974, when the Burgess post-trial motions were being set, the court stated apologetically to counsel as follows:

> THE COURT: I want to say here and now that I did not give Mr. Watkiss an opportunity — not only I didn't give him an opportunity to argue it, I didn't give him an opportunity really to put his case on. I was going away and I wanted to get something decided on the record. And that case is far from finished. I treated my friend David very badly, and I want publicly to say that.
>
> MR. WATKISS: Thank you, your honor.
>
> THE COURT: And I want that transcript before we go on so that we can make amends. I don't mean I am going to decide the lawsuit in your favor, but I am going to give you the opportunity now that I denied you at the time to as thoroughly go into the matter as you desire. (Tr. 1331-1332).

Despite the court's apparent concern about Burgess' inability to "put on its case," no additional evidence was offered or taken at the hearing on post-judgment motions.

3. On argument of Burgess' post-judgment motions, the court was still firm in its original evaluation of the facts and its conclusions. The court's thinking at that time is shown by excerpts from the transcript appended hereto as Appendix B.

4. Thereafter, the court, on its own motion and without indication of the subject matter to be discussed, summoned

[1]The findings and conclusions prepared by Morrin were entirely consistent with the court's oral evaluation of the evidence; the subsequent findings prepared by Burgess were entirely inconsistent with that evaluation.

counsel for further argument on June 28, 1974. After short statements by the parties, the court announced that it had reread *United States* v. *Howard P. Foley Co.*, 329 U.S. 64 (1946), and had concluded that that case controlled the interpretation to be given to the critical contract terms in this case (Petition for Writ of Certiorari, page 4). Burgess was directed to prepare proposed findings of fact, conclusions of law and a judgment.

The unusual procedural history by which the findings, conclusions and judgment were altered in this case was outlined in Morrin's brief to the Court of Appeals (Appendix C); and 19 of the findings were asserted to be clearly erroneous. Petitioner's present concern was adequately raised in the courts below. *Muncie Gear Works* v. *Outboard, Marine & Mfg. Co.*, 315 U.S. 759 (1942); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, *reh. denied*, 340 U.S. 939 (1951); *Trout* v. *Pennsylvania R.R. Co.*, 300 F.2d 826 (3d Cir. 1962).

The Court of Appeals affirmed on grounds that the findings were not clearly erroneous and with the observation that the " 'clearly erroneous' rule creates a difficult burden for an appellant" (526 F.2d, at 116). It gave no consideration in applying that rule to the unusual procedures employed by the trial court. The cases cited by Petitioner and Respondent reveal a high degree of conflict and confusion in the Circuits as to the standards for review of findings prepared wholly by counsel for a litigant. The Circuits require the guidance of this Court in this situation in two respects:

> (1) The procedural prerequisites for the adoption of findings when counsel take part in the process. *Compare Chicopee Mfg. Corp.*, v. *Kendall Co.*, 288 F.2d 719 (4th Cir. 1961) *with Bradley* v. *Maryland Casualty Co.*, 382 F.2d 415 (8th Cir. 1967).
>
> (2) The weight to be given on appeal to findings

adopted by the trial court but prepared wholly by counsel for one party. (Naturally, the weight given on appeal will depend to some extent on the actions of the trial court prior to adoption.) *Compare In Re Las Colinas, Inc.*, 426 F.2d 1005 (1st Cir. 1970) *with Professional Golfers Association of America* v. *Bankers Life & Casualty Co.*, 514 F.2d 665 (5th Cir. 1975).

The procedural issues so clearly raised by this case have long troubled courts, members of the bar and those laymen whose rights and property are affected by the functioning or superficial non-functioning of the judicial process. This case provides a vehicle for this Court to promulgate standards that will permit counsel to participate usefully in the formulation of findings without infringing upon the judicial sphere or appearing to subvert the judicial process.

Respectfully submitted,

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APPENDIX A

Despite apparent denials by Burgess in its Brief in Opposition, trial counsel for Burgess made several admissions with regard to delays and liability for the consequences thereof:

THE COURT: And the contract says you are supposed to get out of there by April 1.

MR. WATKISS: That is right, your Honor.

THE COURT: Now, you weren't out of there by April 1, and that is a fact of life in this lawsuit.

MR. WATKISS: We have to live with that one, Judge.

THE COURT: We are all tied to that.
(Tr. at 1022.)

* * *

THE COURT: I agree with that. We have a contract in this case that says that by June 1 Burgess had to do something or another.

MR. ASHTON: Gate liners and gates.

THE COURT: He was to get the gate liners and gates in, and he was supposed to have that stilling basin finished.

MR. ASHTON: April 1.

THE COURT: April 1. And it looks to me as though you fellows have confessed that.

MR. WATKISS: In my opening statement two weeks ago there are two things I confessed before we put any evidence on. One—

THE COURT: Well, I am right.

MR. WATKISS: Absolutely. We were delayed on the access, and we were delayed on the gate chamber. No question about it.
(Tr. at 1029-1030.)

MR. WATKISS: One other point. I think it is worth addressing to your Honor because I am getting into it next, and that is this gate chamber situation.

THE COURT: Well, you are "in the soup" on that.

MR. WATKISS: No question — I said that going in. I said we couldn't get the steel and whatever cost this man had because he couldn't get in that gate chamber and pour it out, whatever cost — if he put a railroad back in which he didn't have to put in, if he had to crew up and go back in and do it again, you bet it wasn't his fault; it was the steel liners for which we were responsible, and we couldn't get them.

MR. ASHTON: That is our lawsuit.

MR. WATKISS: There is no question about that, Judge.

THE COURT: I think that is the lawsuit.
(Tr. at 1032).

* * *

MR. WATKISS: . . . Now, anyone can be critical of people, but that is his profession. That is what he does for a living, San Francisco, and a very well-known, nationally, world-known, consulting engineering firm, Jacobs & Associates, worked for every big contractor around. He spends 400 hours and carefully reads all of these detailed facts that are in the records and available for study, carefully reviews the plans and specifications, makes his determination on the delay factor, the winter-work factor, all of those things, and he comes up with an estimate of what that job — the reasonable value of the work was; in other words, what it should have been done for, including the profit and all the rest that a good, responsible contractor would get. And he gave the Court a figure. And I was not too happy with it because it was higher than I thought it should have been, but that was

his opinion. It was $821,000, which was $300,000 more than we had paid the man and $100,000 more than the contract provided we owed him.

THE COURT: He was your witness.

MR. WATKISS: He was my witness. I was stuck with that, your Honor, and I will admit it to the Court.

* * *

And, of course, again it depends — and there is no dispute, we computed out, in addition to that three hundred, looking at the record as it was before your Honor, there was the equipment cost that we have admitted; that, if we are found by the Court to be responsible for a breach in addition and he determines quantum meruit is the appropriate type of award, in addition to the three hundred that this man says is the reasonable value that has been given on this type of service — in addition to that we would owe for the use of his equipment thereafter, which is another $38,000. Now, that is on the record. We agreed on those figures because we either stipulated to them or our witnesses presented them.
(Tr. at 1475-1477).

* * *

THE COURT: I don't know how you can minimize that arctic weather over there in the Strawberry region in which we have all lived around here. I have lived over there in that region. And when you are talking about doing concrete work, I am amazed that anybody could do concrete work in the kind of weather you have over at the Strawberry Dam, just amazed that anybody could do anything of the kind in the kind of weather we have.

I mentioned the other day I went to school in 40 degrees below zero weather up there. And, as a matter of fact, the dam area we are talking about here is higher yet than the towns.

Now, I have heard about all I want to hear about that in an attempt to minimize the weather conditions and the difficulty of the job arising out of those weather conditions.

MR. WATKISS: Your Honor, we are not attempting to minimize—

THE COURT: I think we can take judicial notice of the kind of weather conditions they had over there.
(Tr. at 926-927).

Burgess' attempts to imply in its brief that the evidence somehow makes inescapable a conclusion that Morrin's inability to complete on schedule was due to its own poor work. Although there was certainly testimony that Morrin had problems on this project, the statement of Bureau of Reclamation Inspector Mudgett, which was noted by the Court of Appeals (526 F.2d, at 116 n.9) and so heavily relied upon here by Burgess, that Morrin's work was "substandard", was part of an offer of proof and *was not admitted into evidence* by the trial court. (Tr. at p. 1222). Moreover, Mr. Mudgett's testimony on this point was directly contradicted by that of Mr. D'Alessandro, Mudgett's superior, who testified that the work was satisfactory, although slow in getting started. The court again made its view of this type of evidence abundantly clear:

THE COURT: I know what his testimony was. I heard it. Now, the plain fact of the matter in this lawsuit is that Morrin was in difficulty because he was delayed by Burgess in getting in there. He is delayed in several ways. Failure to deliver the gates and liners is one important way. The man is out of sequence on his schedule, how he proposed to do that work, and he never got back into sequence, of course. Always out of it.

Now, you are asking this man to testify as to whether or not Morrin's work was satisfactory after all this de-

lay and after all of the obstacles that were put in his way. After he had commenced pouring some cement and was in the process of pouring some cement, was that being done in a satisfactory way? Was it being done slowly? Was the work slow? Everything Morrin did after he was delayed and after he was obstructed and after he was thrown out of sequence by Burgess was slow, was late, and he ran into all kinds of difficulties, as a matter of fact, because he was out of sequence trying to do that job.

Now, to ask this Bureau of Reclamation fellow to come down here and answer a general question: Was he proceeding satisfactorily at this late date? Was he proceeding slowly at this late date? Now, I don't think it makes much difference whether I sustain the objection and tell you you can't answer that or whether I let him answer that, because I think the weight of that response is negligible. So I am going to allow the response. You can answer that.
(Tr. at 1160-1161).

APPENDIX B

The court considered at great length the applicability of *United States* v. *Howard P. Foley Co.*, 329 U.S. 64 (1946) to the facts of this case and made plain its thoughts upon that subject:

> THE COURT: Let me talk to you a little bit about this now.
>
> Mr. Justice Blacks says — and I think this is critical in the opinion — "In no single word, clause, or sentence in the contract does the Government expressly covenant to make the runways available to respondent at any particular time."
>
> Now, The Government isn't involved here but Burgess is.

MR. WATKISS: Same thing, your Honor.

THE COURT: Yes, same thing. If you want to paraphrase it, "In no single word, clause, or sentence in the contract does Burgess expressly covenant to complete the excavation."

Now, that just isn't so.

MR. ASHTON: A, b, or c.

THE COURT: That just isn't so in this case.

"A." says: "Lower tunnel excavation must be complete to allow access from both ends by 1 April 1971.

"b. Excavation for lower tunnel chute and stilling basins for both chutes must be completed by 1 April 1971.

"c. Gates and steel tunnel liners for lower gate chamber must be delivered on or before 15 May 1971 and installed not later than 1 June 1971."

I don't know how more clearly it could be stated what

the obligation of the excavator is with respect to getting the job done.

Then your last sentence that you rely on:

"The subcontractor will be entitled to a time extension equal to any delay created by a, b, or c above."

But it doesn't say that is the only thing he is entitled to. It doesn't say that is the only thing by any means. And I don't think Foley is in point.
(Tr. at 1416-1417).

* * *

THE COURT: You are doing him out of the benefit of his contract. You get him in a hole. You get him in a hole so he can't perform. He gets into so much trouble that finally he says, "Be my guest."

And who got him into that trouble? You did. You got him in that trouble.
(Tr. at 1423-1424).

* * *

THE COURT: Well, I am prepared to take a position on this one, and I have indicated what it is.

I think Burgess assumed an obligation that it didn't perform.
(Tr. at 1429).

APPENDIX C

Morrin explained the unusual procedural history of the case in its "Brief of Appellant" and argued its impropriety:

> The Court's overall view of the proceedings was expressed near the end of trial when the Court stated that BURGESS had clearly breached the contract, that MORRIN'S sequence of operations had been destroyed and all of that had resulted from BURGESS' failure to carry out its obligations under the contract (Trans. p. 1160 through 1163).
>
> Thereafter, and on the 12th of November, 1973, the Court entered Findings of Fact, Conclusions of Law and Judgment in favor of MORRIN predicated upon breach of contract on the part of BURGESS.
>
> After the post trial motions had been filed by BURGESS, the Court noted the matter for further hearing on May 9, 1974. At that time it made various comments supporting the position of MORRIN. It was at that time that the Court clearly indicated that it was BURGESS who got MORRIN into trouble (Trans. p. 1423 through 1424), that the obligations of BURGESS to furnish the areas of construction site as contracted were unqualified obligations of BURGESS (Trans. p. 1425) and that BURGESS did not perform the obligations which it had assumed toward MORRIN (Trans. p. 1429).
>
> After the hearings on May 9, 1974, nothing transpired until shortly before June 28, 1974. At that time the Court, upon its own motion, notified counsel to appear for additional argument. The notice did not specify any particular matter upon which the Court wished counsel to comment. At the end of a short argument, the Court made a 180° departure from its prior decision

> and held, based on *United States* v. *Foley, supra,* that MORRIN was entitled only to a time extension.
>
> * * *
>
> There was no indication by the Court at any time that any fault was found with the performance of work by MORRIN only that under *Foley* an anticipatory breach was committed when MORRIN stated that due to the winter conditions it would not be able to complete its contract on dates unilaterally established by BURGESS on the date of termination.
>
> There is no logic, common sense or justice in such a decision.
>
> (Brief of Appellant, at pp. 35-36).

The Brief also argued the inconsistency of the trial Court's second findings with the first set entered and with much of the evidence (Brief of Appellant, at pp. 4-5), as well as the signing of the Burgess findings and conclusions without hearing or change. (Brief of Appellant, at p. 9). *See also,* Brief of Appellant, at pp. 32, 55. Further argument on the same theory was made in Appellant's Reply Brief, at pp. 10 and 15-16.

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MOTION BY THE UTAH CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION BY THE UTAH CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amicus, Utah Chapter of the Associated General Contractors of America, hereby moves for permission to file an amicus brief in this case. This motion is being filed under Rule 42(3) because, while Amicus has been advised by counsel for petitioner that it has no objections to the filing of a brief amicus, respondent has not indicated its consent.

This case involves, *inter alia,* the interpretation of a contract clause involving site availability of a type often found in construction contracts. Perhaps more importantly, it involves a matter of paramount significance to any construction contractor—the contractor's right to timely access to the construction site.

The essential interest of Amicus is to relate to the Court the conflicts between the decision of the Circuit

Court and other judicial precedent and to explain the ramifications of that decision upon the construction industry. While noting possible procedural irregularities by the District Court, Amicus will not address that issue or other issues or the merits of the parties' underlying claims except to the extent affected by the Circuit Court's interpretation and application of the site availability clause.

Amicus is an organization of contractors who perform all types of construction work. Its geographical base includes the state of Utah. Its membership presently includes approximately 380 member companies. The Associated General Contractors of America is a recognized spokesman in and for the construction industry.

Amicus believes it is uniquely qualified to demonstrate to the Court the importance to the construction industry of the Circuit Court's interpretation and application of the particular contract clause. While Amicus does not question the parties' ability to present their limited concerns adequately to the Court, Amicus believes that the broad public interest involved in the case may be overshadowed by the specific interests which bring these parties to the Court. For this reason, the request for permission to file an amicus brief should be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE

PRELIMINARY STATEMENT

Amicus is an organization of Utah contractors with approximately 380 member companies who perform all types of construction work. It is a recognized spokesman for the Utah construction industry. Amicus requests leave to file a brief amicus curiae because the case centers on the interpretation of a construction contract clause concerning site availability commonly found in construction contracts. That interpretation will have an effect on contractors throughout the nation. Amicus has a further interest in that the decision was rendered on first impression by the United States District Court for the District of Utah and affirmed on appeal by the United States Court of Ap-

peals for the Tenth Circuit (526 F.2d 108), and therefore the case has special added implications to Utah construction contractors. The intent of Amicus is to relate to the Court the conflicts between the decision of the Circuit Court and decisions of the United States Court of Claims and to explain the ramifications of that decision upon the construction industry.

QUESTION PRESENTED

Where the parties enter into a contract on the basis of a scheduled time of performance, which time period is to commence on a contractually anticipated site availability date, is the failure by one party to the contract to make the site available at the established date, thus changing the period and schedule during which the work is to be performed, a breach of contract?

ARGUMENT

The contract out of which this action arises contains the following clause:

> Section 4. TIME OF PERFORMANCE: The Subcontractor agrees to keep himself informed as to the progress of the project and to faithfully prosecute his work, and the several parts thereof, at such times in such order as the Contractor considers necessary to keep the same sufficiently in advance of the other parts of the project and to avoid any delay in the completion of the construction as a whole. The scheduled TIME OF PERFORMANCE of the work forming a part of this Subcontract is See Exhibit B.

Exhibit B provides as follows:

> Time for completion of this work shall be as follows:

> 1. Concrete in lower tunnel, stilling basins and lower trash rack shall be complete to allow diversion of river through tunnel on or before 1 August 1971 subject to:
>
> a. Lower tunnel excavation must be complete to allow access from both ends by 1 April 1971.
>
> b. Excavation for lower tunnel chute and the stilling basins for both chutes must be completed by 1 April 1971.
>
> c. Gates and steel liners for lower gate chamber must be delivered on or before 15 May 1971 and installed not later than 1 June 1971.
>
> The subcontractor will be entitled to a time extension equal to any delay created by a, b or c above.

The time of performance of construction work is an essential ingredient to any construction contract, and clauses similar to the above clause are commonplace throughout the industry.

The focal point of construction cost estimating is the time during which the work will be performed, including both the duration of the required work effort and the scheduled dates for performing the work. The establishment of a defined performance period benefits the construction contractor in that he can more accurately estimate the costs that he will incur in performing the work. Moreover, the establishment of construction dates benefits the other contracting party because it allows that party to enter into a contractual payment obligation based on the reasonable fixed cost expectation of the contractor who will perform the construction contract work, without excessive contingencies.

Whenever reasonably anticipated construction dates are not met, an impact on construction costs occurs. Therefore, the adherence to contractually established site availability dates is of primary significance to the contractor. Most importantly, that is why the courts should not negate one contracting party's obligation to timely furnish the construction site to the other party at the time contemplated in the contract.

The United States Court of Claims has recognized the importance and binding nature of contractually established site availability dates in a leading case, *Merrit-Chapman & Scott Corp.* v. *United States,* 194 Ct. Cl. 461 (1971). There, the contract called for the construction of a lock and dam in an area occupied by a state highway. The state highway was to be relocated by another contractor, and the work site could not be disturbed until the relocation was complete. In establishing the construction schedule for the lock and dam contractor, the following clause was included in the contract:

> SC-20 ORDER OF WORK—(a) * * * The Contractor is informed that no part of existing State Highway 7 shall be removed until the relocated highway is opened to traffic, *which will be about 1 December 1955.* * * * [Emphasis supplied]

Contrary to the above clause, no part of the existing highway was released to the contractor until much later than the December 1, 1955 date. Based on the above contract language, the Court of Claims held (at 472-473):

> On the claim itself, the first thing to say is that *the contract unequivocally represented that old Highway No. 7, running right through the center*

> *of the construction site, would be made available when the relocated highway was opened to traffic, which "will be about 1 December 1955."* This flat declaration meant that the plaintiff could rightly expect the old route to be given to it no later than a few days after December 1st, and it could rely on having the road available to it by that time.
>
> * * *
>
> In the light of this schedule, the Board correctly concluded in its first decision that "[*t*]*he only possible reason for inserting this date* [*about 1 December 1955*] *was to give the contractor a basis for planning and thus reduce the contingency that would otherwise have to be considered.*" The Board further said, again correctly, "that the Government *represented* [Court's emphasis] that the old highway would be available about 1 December 1955 and assumed the risk for delays beyond this period * * *." [Emphasis supplied]
>
> There is likewise no serious question that the Government omitted to live up to this promise. The bulk of the road was not handed over to plaintiff until April 14, 1956, and the rest not until June 26, 1956.
>
> When the defendant was unable to fulfill its warranty, it, of course, failed in a legal obligation. This would have been a breach of contract and actionable, in the absence of a clause such as the "Suspension of Work" article. That provision is designed for the very purpose of purging the Government of the consequences of what would otherwise be a breach by substituting a claim "redressable under the contract." The failure to hand over the road amounted in effect to a partial suspension of the work by the Government—a stopping by the Government of excavation in that area. It makes no difference, since a suspension actually occurred, whether or not the Government

> was negligent in meeting its obligation to provide the road; the representation was that the road would be available, not simply that the defendant would use its best efforts. See *Abbett Elec. Corp.* v. *United States,* 142 Ct. Cl. 609, 616, 162 F. Supp. 772, 776 (1958). * * *

While it is understood that relief was granted the contractor in *Merritt-Chapman & Scott* under the "Suspension of Work" clause of the contract, the Court made it quite clear that, absent such clause, the Government's action would have constituted a breach of contract.

The same principle was applied by the Court of Claims in *Abbett Electric Corporation* v. *United States,* 142 Ct. Cl. 609 (1958). There, the contract specified that a notice to proceed would be issued to the contractor within 240 calendar days. Another contractor was still performing preceeding work in the needed work area at the end of the 240 day period, so the Government issued the notice to proceed but then told the contractor that it would have to delay its performance. The Court of Claims held that the failure to make the site available at the end of the 240 day period was a breach of contract regardless of whether the Government "might not have been negligent in meeting its obligations under the contract * * * ." (at p. 616)

In *George A. Fuller Company* v. *United States,* 108 Ct. Cl. 70 (1947), the contractor for the construction of the National Archives Building was required to construct ornamentation work in accordance with sculptural carving and ornamentation models which were being made by another contractor under separate contract. The models were not available for the construction contractor when he needed them. While the contract did not provide specific dates by which the models were to be furnished, the Court of Claims found that the late furnishing of the models was a breach of contract. In this regard, the Court of Claims stated (at p. 101):

> * * * In the case at bar we think the Government did agree to furnish these models as soon as the contractor needed them. We are of the opinion that it was an implied obligation on the part of the Government not to delay the contractor's work by a failure to furnish it the models as required, and that if it did so, it is liable to it for the consequent damages. We do not believe the Supreme Court intended by its decision in the *Foley* case to overrule its numerous prior decisions so holding.
>
> We think that the Government when it agreed to furnish the models without condition was bound to furnish them on time as much as if an express provision to this effect had been incorporated in the contract, and that if it failed to do so it breached this provision of the contract and is therefore liable for any damages resulting therefrom.

The present case is not dissimilar. The contract provided by its express terms a "SCHEDULED TIME OF PERFORMANCE" and that scheduled time of performance was no less binding than the obligations imposed on the contracting parties by the contracts involved in *Merritt-Chapman & Scott, Abbett Electric* and *George A. Fuller.* Because of the failure to timely make the site available, the work could not be carried out in accordance with that contractually scheduled time of performance. As a result, a breach of contract occurred.

It is not enough to conclude in the circumstances that the breach was rectified by a mere time extension. While the time extension provision may be relevant to the assessment of liquidated damages, it is not a remedy for a breach of contract. In this regard, it has been held that the provision for a time extension in the event of delay does not operate as a bar to the recovery of increased costs incurred as a result of the delay. *George A. Fuller Co.* v. *United States, supra* at 96-97, and cases cited therein.

CONCLUSION

For the foregoing reasons, it is submitted that the decision of the Circuit Court is erroneous, conflicts with judicial precedent of the United States Court of Claims and will have far ranging ramifications within the construction industry. Wherefore, it is submitted that certiorari should be granted.

Respectfully submitted,

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BURGESS CONSTRUCTION COMPANY, ET AL., *Respondents.*

RESPONDENT'S OBJECTION TO MOTION BY THE UTAH CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Respondent, BURGESS CONSTRUCTION COMPANY, an Alaskan contractor, objects, pursuant to Rule 42(3), to the filing of a Brief Amicus Curiae by the Utah Chapter of the Associated General Contractors of America. Respondent withholds consent to Applicant's filing for the following reasons:

1. Applicant has no interest in this matter other than to support Petitioner, M. MORRIN & SONS COMPANY, INC., a Utah contractor and an influential member of the Applicant Chapter.

2. Applicant has not presented, nor can it present, any relevant questions of law or fact that have not been raised by Petitioner.

3. Applicant has no reason to believe that all relevant questions will not be adequately presented or that Applicant is uniquely qualified to contribute special expertise or enlightenment.

Applicant's motion states that its essential interest is to relate to the Court alleged conflicts between the decision of the United States Court of Appeals for the Tenth Circuit and other judicial precedent and to explain the ramifications of that decision for the construction industry. However, Applicant's Brief cites only three cases, all from the Court of Claims, two of which are found in the Petition for Writ of Certiorari. The additional case, *Merritt-Chapman & Scott Corp.* v. *United States*, 439 F.2d 185 (Ct. Cl. 1971), involved a claim against the Government under a contract which "unequivocally represented" with a "flat declaration" that the construction site would be made available on a date certain.[1] Unlike these three administrative cases, the instant case for breach of contract involved a contract which contemplated and excused delays. Thus, *Merritt-Chapman*, like the cases raised by Petitioner, is similarly distinguishable and merely cumulative.

Like Petitioner, Applicant erroneously contends that the instant case concerns interpretation of a standard contractual provision which has potentially broad ramifications. Applicant's brief sets forth the critical provisions found in Exhibit "B" to the subcontract and shows that this addition was drawn by the parties for the particular project and did not establish a certain date for site availability but expressly provided for delays in site access and time extensions equivalent to such delays.

[1] 439 F.2d at 191.

The Court of Appeals decision carefully considered all issues and properly interpreted this specially drawn Exhibit covering site access for the subcontractor. This decision creates no conflict with Applicant's cases and produces no far ranging ramifications for the construction industry.[2]

CONCLUSION

The Applicant organization has no valid interest and presents only a redundant voice in support of Petitioner, an organization member. Applicant's motion should be denied.

Respectfuly submitted,

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[2] As the Court of Appeals correctly noted, "this case does not involve the standard form clauses. The dispute is over a clause drawn and added to the contract by the parties." *Burgess Construction Co.* v. *M. Morrin & Son Co.*, 526 F.2d 108, 114 n.3 (10th Cir. 1975).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1468

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Petitioner,

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Respondents.

MOTION BY THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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MOTION BY THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the Associated General Contractors of America (hereinafter AGC) and moves for permission to file a brief amicus curiae in this case pursuant to Rule 42(1) and (3). Petitioner has advised AGC that it has no objection to the filing of the brief, but respondent has not given its consent.

The AGC is a national organization of general contractors who perform all types of construction work throughout the world. It was founded in 1918 by ninety-seven of this country's then-leading general contractors. Its membership now includes approxi-

mately 8,200 general contracting firms who perform approximately $60 billion in construction work a year. The AGC is a recognized spokesman in and for the construction industry.

AGC requests leave to file a brief amicus curiae because this case centers upon the interpretation of a contract clause involving construction site availability. Availability of the construction work site is of utmost importance to any construction contractor, and clauses of the type involved in this case are often found in construction contracts.

The AGC believes that the Circuit Court of Appeals for the Tenth Circuit erred as a matter of law in concluding in this case (526 F.2d 108) that the prime construction contractor did not breach its contract with its subcontractor when it failed to turn over portions of the construction site at the times contemplated in the contract by the parties. Moreover, AGC believes that the Circuit Court's decision in this regard is in conflict with judicial precedent established by the United States Court of Claims.

The issue in this case is of broad significance transcending the bounds of the individual parties' grievances. It can be better addressed by segments of the industry rather than by the individual parties.

It has come to the AGC's attention that a number of its chapters have already filed amicus motions in this case with the Court. The Utah Chapter has filed a motion for leave to file a brief amicus curiae, along with its brief amicus curiae, and the Colorado and Wyoming chapters have separately filed motions for leave to file briefs amici curiae. In addition, AGC is aware that the Idaho, Montana, New Mexico and Inland Empire

(Washington) chapters have voted to submit their views to the Court. In addition, other chapters are considering similar action in this case. AGC therefore proposes to act hereinafter in this case as representative and spokesman for all of its chapters.

With regard to the issues in this case, AGC of course is in full accord with the views expressed to the Court by the Utah Chapter in its motion and brief amicus curiae. Moreover, AGC believes that the brief of the Utah Chapter adequately addresses the legal and practical considerations involved in the case.

WHEREFORE, AGC would prompt the Court to grant certiorari in this case and requests that leave be granted for AGC to file a brief amicus curiae.

Respectfully submitted,

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IN THE

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MOTION BY THE ASSOCIATED GENERAL CONTRACTORS OF WYOMING, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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MOTION BY THE ASSOCIATED GENERAL CONTRACTORS OF WYOMING, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the Associated General Contractors of Wyoming, Inc., and moves for permission to file a brief amicus curiae in this case pursuant to Rule 42(1) and (3). Petitioner has advised Movant that it has no objections to the filing of the brief, but respondent has not given its consent.

Movant is the highway, heavy engineering and utility chapter of the Associated General Contractors of America serving the state of Wyoming. Its members performed approximately 99% of the highway con-

struction performed in Wyoming during Movant's past fiscal year, and its members performed a majority of the heavy engineering and utility work performed in Wyoming during that same period.

Movant believes that the Circuit Court of Appeals for the Tenth Circuit erred as a matter of law in concluding in this case (526 F.2d 108) that the prime construction contractor did not breach its contract with its subcontractor when it failed to turn over portions of the construction work site at the times contemplated in the contract by the parties. This issue is one that affects the entire construction industry and can be better addressed by segments of the industry rather than by the individual parties.

With regard to the issues involved, Movant is in basic agreement with the statements and views enunciated to the Court by amicus Utah Chapter of the Associated General Contractors of America, and Movant therefore adopts the Brief Amicus Curiae of the Utah Chapter as the further expression of its position herein.

Wherefore, Movant's request for leave to file an amicus brief should be granted, and its acquiescence in the Brief Amicus Curiae of the Utah Chapter of the Associated General Contractors of America should be appropriately noted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1468

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MOTION BY THE COLORADO CONTRACTORS ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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MOTION BY THE COLORADO CONTRACTORS ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the Colorado Contractors Association, Inc., and moves for permission to file a brief amicus curiae in this case pursuant to Rule 42(1) and (3). Petitioner has advised Movant that it has no objections to the filing of the brief, but respondent has not given its consent.

Movant is an association comprised of eighty-one contractors who perform highway construction, heavy engineering and utility construction work. Its mem-

bers performed approximately 93% of all highway construction performed in Colorado during Movant's past fiscal year, and its members performed a majority of the heavy engineering and utility construction work performed in Colorado during that same period. Neither petitioner nor respondent is a member of the Colorado Contractors Association.

Movant is a chapter of the Associated General Contractors of America, as is amicus Utah Chapter of the Associated General Contractors of America. However, Movant is otherwise unassociated with amicus Utah Chapter, and its membership consists basically of Colorado contractors, while the Utah Chapter basically represents the Utah construction industry.

Movant believes that the Circuit Court of Appeals for the Tenth Circuit erred as a matter of law in concluding in this case (526 F.2d 108) that the prime construction contractor did not breach its contract with its subcontractor when it failed to turn over portions of the construction work site at the times contemplated by the parties. This issue is one of broad public significance transgressing the bounds of the individual parties' grievances, and can be better addressed by segments of the industry rather than by the individual parties.

With regard to the issues involved, Movant is in basic agreement with the statements and views enunciated by amicus Utah Chapter, and Movant therefore will adopt the Brief Amicus Curiae of the Utah Chapter as the further expression of its position herein.

Wherefore, Movant's request for leave to file an amicus brief should be granted, and its acquiescence

in the Brief Amicus Curiae of the Utah Chapter of the Associated General Contractors of America should be appropriately noted.

Respectfully submitted,

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